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ARTICLES

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*Luis E. Chiesa**

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INTRODUCTION

Animal cruelty is considered a crime in all fifty states, the District of Columbia, Puerto Rico and the Virgin Islands.[1] Although the punishment for abusing animals differs widely among jurisdictions, all but five states make it a felony offense.[2] Some states, like New York, only make it a felony if the acts of cruelty are performed on a *companion* animal.[3] Others, like Pennsylvania, aggravate punishment if harm is caused to a dog, cat or zoo animal.[4] The criminalization of cruelty to animals is by no means an American phenomenon. Comprehensive anti-cruelty legislation has been adopted in many countries, including the United Kingdom, Holland, Australia and Argentina, to name a few.[5]

Even though most countries seem to believe that it is desirable to criminalize cruelty to animals, the reasons that justify prohibiting such conduct are unclear. Whereas some jurisdic-

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[1] *See* The Humane Society of the United States, *State Animal Anti-Cruelty Law Provisions*, June 2008, http://www.hsus.org/web-files/PDF/state_cruelty_chart.pdf.

[2] *Id.* Animal cruelty is a misdemeanor in Arkansas, Idaho, Mississippi, North Dakota and South Dakota. *Id.* It should be noted that Mississippi has a special statute making it a felony to engage in cruelty to livestock. MISS. CODE ANN. § 97-41-15 (2006). Companion animals and wildlife fall outside the purview of the law. *Id.*

See infra note 81-82 and accompanying text (describing companion animals).

[3] N.Y. AGRIC. & MKTS. LAW § 353-a(1) (McKinney 2004).

[4] 18 PA. CONS. STAT. ANN. § 5511 (West 2000 & Supp. 2007).

5 For information on animal protection laws in these countries, *see* Law No. 14346, Sept. 27, 1954 (Arg.); Queensland Government, http://www.dpi.qld.gov.au/cps/rde/dpi/hs.xsl/27_10422_ENA_HTML.htm (last visited Oct. 31, 2008) (providing links to various Austrlian state's or territory's animal welfare legislation); Consulate General of New York, http://www.cgny.org/article.asp?articleref=AR00000200EN (last visited Oct. 31, 2008) (describing the Netherland's 1992 Animal Health and Welfare Act); Animal Welfare Act, 2006, c. 45 (Eng.) (enacting animal welfare legislation in the United Kingdom).

tions seem partially motivated to enact the statutes because people who harm animals are more likely to inflict suffering on human beings, others seem to have been moved into action by a deeply felt conviction that inflicting harm on a sentient being is morally wrong. Moreover, some state laws are drafted in a manner that suggests that one of the preeminent reasons for adopting such legislation was the protection of property.

Ascertaining the reasons that justify punishing people for engaging in acts of cruelty against animals is not merely of theoretical concern. As the recently decided case of *People v. García*[6] demonstrates, it is difficult, if not impossible, to determine the proper scope of anti-cruelty statutes without first answering the question of why it is that such conduct is a crime in the first place. In *García*, the Appellate Division of the Supreme Court of New York had to determine whether the defendant's act of stomping on a pet goldfish, in the presence of Juan, the nine year old custodian of the fish, constituted a felony.[7] In order to do so, the court needed to decide whether instantaneously killing a fish by stepping on him constituted an act of "aggravated cruelty."[8]

Since the fish died instantly, the defendant contended that he did not suffer extreme pain and that his death was caused without special depravity or sadism.[9] Thus, he asserted that the killing was not carried out with a heightened level of cruelty.[10] The court rejected the defendant's contention by pointing out that, in view of the legislative history of the statute, whether an act demonstrates aggravated cruelty depends on "the state of mind of the perpetrator."[11] The court's holding also seemed to be heavily influenced by the fact that the killing of a household pet in front of a child constitutes a "sadistic and depraved act" be-

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[6] 812 N.Y.S.2d 66 (App. Div. 2006).

[7] *Id.* at 69-71.

[8] *Id.*

[9] *Id.* at 71.

[10] *Id.*

[11] *Id.*

cause it is intended to "inflict[] emotional pain on . . . the boy."[12]

By concluding that a finding of aggravated cruelty depends on whether the actor intended to make the owner of the animal suffer,[13] the court suggests the purpose of anti-cruelty statutes is to deter people from engaging in acts that cause emotional harm to human beings and not protecting animals from unjustifiable inflictions of pain. Thus, according to *García*, the real victims in these cases are not the animals who are being mistreated, but the humans who suffer when living creatures are harmed.

This article will show the court's reasoning in *García* cannot withstand careful scrutiny. Concluding that anti-cruelty statutes were enacted for reasons other than protecting animals from the unwarranted infliction of pain is in tension with basic criminal law principles. Furthermore, the best way to account for the most salient features of anti-cruelty statutes is by acknowledging that the victims to be protected by the enactment of such laws are animals, not human beings.

Part I will provide a brief recount of the history of Anglo-American statutes prohibiting harm to animals. This historical analysis will show that many of these statutes were originally enacted as a way to protect private property. However, it will also reveal that there has been a marked trend, especially in recent times, to punish animal cruelty regardless, and sometimes despite, the property interests involved.

In Part II, the notions of victimhood, consent and harm will be explored in order to lay the groundwork for the claims that will be put forth in the remainder of the article. It is difficult to have a meaningful discussion about the interest the law seeks to protect by criminalizing cruelty to animals without first understanding the intricate interrelationship that exists between these concepts. In light of the issues raised by animal cruelty statutes, particular attention will be paid to discussing John

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[12] People v. García, 777 N.Y.S.2d 846, 852 (Sup. Ct. 2004) (Trial court description of defendant's act.).

[13] People v. García, 812 N.Y.S.2d 66, 71 (App. Div. 2006).

Stuart Mill's and H. L. A. Hart's conception of the "harm principle." The legitimacy of enacting victimless crimes and the ways in which consent can negate both harm and victimhood will also be considered.

Part III will examine five different theories advanced to explain the interest society seeks to promote by punishing acts that are harmful to animals, namely: (1) protection of property, (2) protection against the infliction of emotional harm to those who have ties to the injured animal, (3) prevention of future harm to humans, (4) enforcement of a moral principle, and (5) protection of the animals themselves.

Part IV will explain why it is not necessarily the case, as some animal law scholars have argued, that because animal cruelty statutes allow for the infliction of harm to animals as a result of hunting, scientific activities and farming, the interest primarily sought to be protected by these laws is something other than the protection of animals. Although seductive at first glance, this argument is ultimately flawed because it is premised on a misunderstanding of the structure of criminal offenses in general and of anti-cruelty statutes in particular. Properly understood, the existence of privileges that allow people to infringe the prima facie norm against harming animals merely reveals society's belief (right or wrong) that countervailing reasons justify harming the interest sought to be protected. However, this does not mean the prohibitory norm was not really designed to protect animals in the first place.[14]

In conclusion, this article will argue society has decided to criminalize harm to animals primarily out of concern for the wellbeing of such creatures, not because doing so furthers some

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[14] In criminal law terms, this can be restated in the following manner: the existence of a justification (i.e. self-defense or choice of evils) provides the actor with reasons that allow him to infringe the prima facie norm against engaging in such conduct (i.e. the "offense"). This does not mean, however, that the existence of a justification (self-defense in a homicide case, scientific tests in an animal cruelty case) *cancels* the reasons the offense provides us for not engaging in the conduct (protecting human life in homicide, protecting animals [arguably] in animal cruelty laws). *See generally* John Gardner, *Fletcher on Offences and Defences,* 39 TULSA L. REV. 817 (2004).

other human interest. Finally, the court's analysis in *People v. García* will be reexamined in light of the conclusions advanced in this article.

I. Animals and the Criminal Law: History and Contradictions

The first statute criminalizing abusive conduct towards animals was enacted in Great Britain in 1822. The law, commonly known as "Martin's Act," made it a crime to cruelly beat or otherwise mistreat horses, mules, cows, sheep or other cattle.[15] At that time, cruelty to animals did not constitute an indictable offense at common law.[16] Prior to the enactment of Martin's Act, cruelty to animals was only deemed criminal if it satisfied the elements of some other offense made punishable at common law, such as breaches of the peace or malicious mischief.[17] By adopting this statute, the English Parliament filled this perceived gap in the law, representing a substantial shift in the state of animal cruelty law. Whereas at common law, acts that inflicted unjustifiable pain on animals were considered legal wrongs only if the creature harmed was the property of another, after the passage of Martin's Act such conduct was a crime even when the injured animal was not owned by anyone.[18]

In the United States, as in England, mistreatment of animals was first made a crime through legislation. However, in contrast with the early statutes adopted in Great Britain, some of the anti-cruelty laws initially enacted in America only made it a criminal offense for someone to engage in abusive acts against animals owned by another person. For example, an 1846 Vermont statute made it a crime to "willfully and maliciously kill, wound, maim or disfigure any horse, or horses, or horse kind,

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[15] David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800's*, 1993 DET. C. L. REV. 1 (discussing Martin's Act).

[16] State v. Bruner, 12 N.E. 103, 104 (Ind. 1887).

[17] *Id. See also* Respublica v. Teischer, 1 Dall. 335 (Pa. 1788).

[18] Favre & Tsang, *supra* note 15, at 4.

cattle, sheep or swine, *of another person.*"[19] By limiting the scope of the prohibition to acts that cause harm to animals belonging to someone else, the Vermont General Assembly was making it clear that the purpose of the statute was to protect property rights, not animals. Furthermore, by only punishing cruelty against animals of commercial value, the legislature revealed that its preeminent reason for prohibiting the conduct was to proscribe acts that were perceived to adversely affect important economic interests.[20]

Not all anti-cruelty laws adopted in America during the nineteenth century were solely inspired by an interest to protect property rights. Some early statutes criminalized the malicious mistreatment of animals regardless of whether they were the property of someone else. For instance, an 1829 New York law made it a crime to "maliciously and cruelly beat or torture any horse, ox or other cattle, or any sheep, *whether belonging to himself or another.*"[21] By making the ownership question irrelevant, this law signified an important change in the legal discourse undergirding the anti-cruelty movement. Whereas laws like the 1846 Vermont statute clearly regarded the owner of the animal as the victim of the offense, statutes like the 1829 New York law seemed to turn this conception of anti-cruelty legislation on its head by implying the animal, not the owner, was the legally protected interest.

It should be noted, however, that the 1829 New York law only criminalized abusive conduct towards commercially valuable animals. This brings to light a tension in anti-cruelty statutes that remains unresolved to this day. It is not easy to reconcile the status of animals as victims with the idea that only commercially valuable creatures are worthy of protection from wanton acts of cruelty. If the purpose of prohibiting the conduct is to protect animals from the unjustifiable infliction of pain, it

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[19] 1846 VT. ACTS & RESOLVES 34 (emphasis added).

[20] *See generally* Favre & Tsang, *supra* note 15.

[21] N.Y. REV. STAT. tit. 6, 26 (1829) (emphasis added), *available at* http://www.animallaw.info/historical/statutes/sthusny1829.htm.

is difficult to understand why economic value should condition the scope of the statutes.

Unfortunately, albeit for different reasons, most modern anti-cruelty statutes are plagued by similar incongruities. While a majority of jurisdictions have expanded the scope of anti-cruelty statutes to encompass the protection of animals that are not generally considered to be of significant economic value,[22] most state anti-cruelty statutes discriminate between those individuals who harm a domesticated or companion animal and those who injure non-domesticated animals.[23] Thus, the killing of a rodent with a mousetrap inside private property is generally not considered a crime.[24] However, causing the death of a pet hamster is.[25] Another salient feature of modern anti-cruelty statutes is the tendency to afford heightened legal protection to dogs and cats. In the State of Alabama, for example, engaging in acts of cruelty in the first degree towards a dog or cat is a felony.[26] Nonetheless, performing identical acts on horses, cows, rabbits, rodents or any other animal is merely a misdemeanor.[27]

In view of these considerations, modern anti-cruelty statutes, much like their nineteenth century counterparts, are fraught with contradictions. On the one hand, the push to ex-

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[22] *See, e.g.*, ARK. CODE ANN. § 5-62-102 (2005) (making it a crime to unjustifiably harm *any* animal in custody of a human being regardless of its economic value).

[23] *See, e.g.*, N.Y. AGRIC. & MKTS. LAW §§ 332-378 (McKinney YEAR); N.Y. PENAL LAW § 130.2 (McKinney 2004). A couple of states have gone as far as arbitrarily excluding livestock from the definition of "animals" protected by their anti-cruelty laws. *See, e.g.*, IOWA CODE ANN. § 717B.1(1)(a) (West 2003); UTAH CODE ANN. § 76-9-301(11)(b)(ii) (2003).

See Pamela D. Frasch et al., *State Animal Anti-Cruelty Statutes: An Overview*, 5 ANIMAL L. 69 (1999), *available at* http://www.animallaw.info/articles/arus5animall69.htm (last visited Oct. 20, 2008).

[24] *See, e.g.*, WIS. STAT. ANN. § 951.06 (West 2005) (prohibiting cruelty to rodents except when poison is used on one's own premises and designed for the purpose of rodent or pest control).

[25] *Id.*

[26] ALA. CODE § 13A-11-241 (2008).

[27] ALA. CODE § 13A-11-14 (LexisNexis 2005).

pand the number of animals protected by anti-cruelty statutes and the increasing tendency to protect animals irrespective of questions of ownership suggests that the purpose of adopting these laws is to safeguard animals from unnecessary suffering. On the other hand, the different treatment that non-companion animals receive as opposed to domesticated creatures indicates that the aim of these laws is something other than the protection of animals from harm. If the objective of anti-cruelty statutes is to keep animals free from unnecessary suffering, why should it matter whether the animal is domesticated? A rodent killed by a mousetrap feels as much pain as a pet hamster killed in a similar manner. However, only harm to the latter is deemed criminal under the typical anti-cruelty law.[28]

New York's current statute prohibiting abusive conduct towards animals, commonly known as "Buster's Law," exemplifies many of the contradictions that have been described here.[29] For starters, even though it is considered a crime to perform acts of cruelty against any animal, it is only a felony to engage in aggravated cruelty towards a "companion animal."[30] Moreover, Buster's Law contains an exemption that allows people to engage in harmful acts against animals during the course of several activities, such as fishing and hunting.[31] As a result of this provision, the killing of a trout during a recreational fishing trip does not constitute a punishable crime, whereas the killing of a pet goldfish does. In light of these considerations, it is unclear whether the chief purpose of Buster's Law is to protect animals from the unjustifiable infliction of pain or to deter people from engaging in acts that harm individuals with strong emotional ties to a particular animal or animals.

Unsurprisingly, in *People v. García,* the Appellate Division of the Supreme Court of New York struggled to come to grips with the conflicting rationales that seem to have underpinned

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[28] *See supra* notes 24-25 and accompanying text.

[29] N.Y. AGRIC. & MKTS. LAW § 353-a(1) (McKinney 2004).

[30] *Id.*

[31] *Id.*

the adoption of Buster's Law in particular and the enactment of anti-cruelty statutes in general.[32] While on several occasions the court seemed to suggest that the victim of the offense was the boy who suffered the loss of his beloved pet, on other occasions it appeared to suggest that the real victim was the fish who was unjustifiably harmed by the defendant.[33] Complicating the matter is the fact that the court's ruling was also influenced by the contention that cruelty to animals should be prohibited because "man's inhumanity to man often begins with inhumanity to those creatures that have formed particularly close relationships with mankind."[34] Consequently, the court in *García* elaborated three distinct (and sometimes conflicting) theories of the harm that is sought to be prevented by anti-cruelty statutes: (1) harm to those who have developed emotional ties to the animal, (2) harm to the animal, and (3) the possibility of future harm to humans on the basis of a correlation between violence against animals and violence against people.[35]

The purpose of the remainder of this article is to evaluate which of these differing conceptions of anti-cruelty statutes better explains and justifies our practices of blaming and punishing people for engaging in abusive conduct against animals. Before doing so, however, it is necessary to briefly examine the notions of victimhood, consent and harm.

II. VICTIMHOOD, CONSENT AND HARM

A. Victimhood

1. Preliminary Considerations

Generally speaking, a victim is a party against whom a per-

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[32] People v. García, 812 N.Y.S.2d 66, 68, 69-71 (App. Div. 2006).

[33] *Id.* at 69-71.

[34] *Id.* at 68 (citing N.Y. Assembly Memo in Support of 1999 N.Y. Sess. Laws 1585).

[35] *Id.* at 69-71.

son has committed a crime.[36] Therefore, the notions of "victimhood" and harm are intertwined. Someone is considered a victim only if he has been harmed by another person. Usually, criminal statutes prohibit conduct that causes harm to some important interest of the victim. Thus, the typical penal code contains sections that prohibit "crimes against the person," "crimes against property," "crimes against sexual autonomy," and "crimes against liberty." In each of these instances, a crime is committed when someone unjustifiably interferes with the fundamental interests of another person. In the crime of theft, for example, the offender unlawfully interferes with someone else's right to private property. When someone commits homicide, he is unjustifiably interfering with the victim's right to life. "In the case of rape, . . . the [perpetrator] seeks pleasure by violating the victim's fundamental right to decide how and when [he or]she wants to engage in sexual intercourse."[37]

It should be noted, however, that there are many crimes whose consummation does not entail causing harm to a victim. Most drug possession offenses represent paradigmatic examples of these types of crimes. Take, for example, the offense of possessing marijuana for personal consumption. Note that this conduct in no way interferes with another person's fundamental interests. The person who commits this offense has not denied the value of someone else's life, nor has he interfered with the rights of others. Thus, there is no victim whose interests are vindicated by punishing the offender.[38] The perpetrator in these cases has violated a norm, to be sure, but in doing so he or she has not victimized anyone.

When, as in the case of drug possession offenses, the perpetrator's criminal conduct does not interfere with the interests of another person, he is said to have engaged in a "victimless

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[36] MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS 158 (2002).

[37] Luis E. Chiesa, *Taking Victims Seriously: A Dworkinian Theory of Punishment*, 76 REV. JUR. U.P.R. 117, 125 (2007).

[38] *Id.*

crime." Additional examples of offenses traditionally regarded as victimless crimes are prostitution, driving while intoxicated, and engaging in consensual sodomy.

The government may have various reasons for prohibiting victimless crimes. Sometimes these types of offenses are created as a way of enforcing moral principles. This is most often the case when the state prohibits certain types of consensual sexual conduct. The criminalization of consensual sodomy constitutes a prime example. Even though engaging in such conduct harms neither the persons who perform the act nor third parties, it has been prohibited because many individuals consider sodomy to be an act that contravenes their religious and moral beliefs.[39]

Occasionally a state decides to create a victimless crime as a way to deter people from engaging in acts that may harm someone in the future. This tends to be the purpose of prohibiting the act of driving under the influence of intoxicants. Although driving while intoxicated is not harmful *per se*, those who engage in such conduct are more likely to injure someone than those who do not. In these cases, the objective of the criminal sanction shifts from exacting retribution for a harm done to preventatively neutralizing dangerous individuals before they engage in harmful conduct.

Sometimes, as in the case of environmental crimes, it is unclear whether the government has created a victimless crime. Consider the offense of knowingly releasing hazardous pollutants into the air.[40] Engaging in this conduct does not directly interfere with the interests of others. Thus, at first glance, this offense seems to constitute a victimless crime. However, the aggregate effect of pollution will almost certainly result in harm to our health. Hence, in the long run, we are all going to be victims of the pernicious consequences of this conduct. Due to the resulting future harm, it can be coherently argued that the offense of releasing a hazardous pollutant into the air is not a victimless

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[39] *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[40] 42 U.S.C.A. § 7401 (West 2003).

crime despite the fact that such conduct does not directly harm anyone at the time the act occurs.

The legitimacy of creating victimless crimes has been increasingly called into question. As time has passed, societies have become more democratic and government less authoritarian, and the focus of the criminal law has shifted from the safeguarding of the State to the protection of persons.[41] Once it is accepted that the chief purpose of penal statutes is to vindicate the rights of those that have been harmed by the perpetrator's harmful conduct, it is difficult to justify punishing people for engaging in acts that do not interfere with the rights of individuals. Taking this contention seriously should lead us to question the legitimacy of creating victimless crimes, particularly when the only reason for doing so is to enforce a particular conception of morality by way of the criminal law.

This is not to say, however, that prohibiting conduct that does not cause harm to a victim is necessarily illegitimate. No one seriously believes, for example, that criminalizing the act of driving while intoxicated is injudicious or unjustifiable. Although such conduct does not entail interference with the interests of others, the undeniable dangerousness of the act seems to provide a more than adequate reason for its prohibition. Nevertheless, in the absence of compelling reasons that point to the contrary, victimless crimes are generally considered to be at least prima facie or presumptively illegitimate. However, this presumption of illegitimacy can be rebutted by demonstrating that there are sound reasons for prohibiting the conduct.

2. Victimhood and Anti-Cruelty Statutes

It is unclear whether anti-cruelty statutes prohibit victimless crimes. If one considers that the chief purpose of these laws is to protect property rights, then it should follow that there is a legally protected victim—the owner of the harmed creature. If conceived in this manner, animal cruelty statutes would be con-

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[41] DUBBER, *supra* note 36, at 152.

sidered a species of the more general crime of criminal damages.

On the other hand, if one conceives laws criminalizing the mistreatment of animals as enactments that purport to deter people from inflicting suffering on those who have strong emotional ties to the creatures, the victim of the offense would be the person whose sensibilities were affected by the act of the perpetrator. This conception of victimhood seemed to partially inform the reasoning of the court in *People v. García*.[42] By implying that the defendant's act revealed a heightened level of cruelty because the killing of the goldfish caused Juan much suffering, the court seemed to be suggesting the victim in these cases is the individual who suffers when someone harms a creature that he holds dear.[43]

It can also be argued that cruelty to animals is a crime because those who mistreat animals are more likely to harm human beings than those who do not. If this were the case, the purpose of punishing those who unjustifiably make animals suffer would be to neutralize dangerous individuals before they engage in conduct that could harm a human being. Under this conception, cruelty to animals would constitute a victimless crime, since the conduct is considered criminal in light of the fact that it reveals the dangerous nature of the offender and not because the act interferes with the rights of persons. In *People v. García*, the court seemed to have had this conception of anti-cruelty statutes in mind when it asserted that these laws were enacted in recognition that "man's inhumanity to man often begins with inhumanity to [animals]."[44]

Legislation proscribing the infliction of harm on animals can also be defended on the grounds that a majority of the population considers such conduct to be immoral.[45] If the perceived immorality of unnecesarily harming animals is the

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[42] 812 N.Y.S.2d 66 (App. Div. 2006).

[43] *Id.* at 69-71.

[44] García, 812 N.Y.S.2d at 68 (citing N.Y. Assembly Memo in Support of 1999 N.Y. Sess. Laws 1585 (McKinney)).

[45] PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 17 (1965).

sole basis for criminalization of animal cruelty, offenses prohibiting such conduct would clearly constitute victimless crimes.

Finally, it might be argued that the purpose of laws that make cruelty to animals a crime is to protect the creatures from unjustifiable inflictions of pain. Under this conception of anti-cruelty statutes the victim of the offense is the animal harmed by the wrongful conduct of the perpetrator. This approach necessarily requires that we interpret the notion of "victimhood" in a broad manner so as to allow for non-humans to qualify as victims. Some criminal law theorists object to this expansion of the concept noting that only autonomous beings can have their rights violated in such a manner that it is appropriate to label them as "victims."[46]

B. Consent

1. Preliminary Considerations

The notions of consent and victimless crimes are intertwined. As a general rule, someone is considered a victim only when he has been forced to do something that he would otherwise not wish to do. If the person consents to the act that the alleged offender wanted him to perform, we would be hard-pressed to believe that he was victimized by the offender. Therefore, a victim's consent changes what initially appears to be an unjustifiable act of forceful subjugation into a permissible act of self-determination.[47] As Professor Dubber aptly points out: "By consenting, the apparent victim rebuts the presumption of victimhood. He indicates that another's act that facially satisfies the elements of a crime does no harm to his autonomy in fact. In the light of consent, an apparent act of heteronomy is revealed as an act of autonomy."[48] The transformative effect of consent is

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[46] DUBBER, *supra* note 35, at 257-59.

[47] *Id.*

[48] *Id.* at 264.

apparent in cases involving the alleged commission of a rape. In these cases, the consent of the victim transforms what would otherwise be considered a deplorable act of sexual imposition into an unobjectionable act of lovemaking.[49] By consenting to the conduct the person is making a conscious decision about what types of acts make his life a life worth living. Therefore, in the absence of coercion or of legal capacity to acquiesce to the act, the consenting victim is suffering no interference with his rights that need to be vindicated by the infliction of punishment.[50] Upon closer inspection, it turns out that punishing someone for performing an act to which the alleged victim consented is tantamount to punishing someone for committing a victimless crime. The reason for this is that if the victim consents to the act, he is not really a victim at all. Consequently, punishing the supposed offender for engaging in the consented act is as objectionable as inflicting punishment on a person who committed an act that did not cause harm to a victim.[51]

Despite the undeniable transformative effects of consent, courts have been slow to recognize the acquiescence of the victim as a defense to criminal liability. The reticence has been more palpable in cases involving the infliction of physical injury or death. Thus, courts have been reluctant to allow defendants to plead consent as a defense to the crime of assault.[52] More controversially, many jurisdictions have refused to recognize an individual's informed consent to euthanasia as a defense to the crimes of murder and assisting in suicide.[53]

Although courts have been generally unwilling to recognize the assent of the victim as a defense to a violent offense, consent

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[49] *See generally* Heidi M. Hurd, Blaming *the Victim: A Response to the Proposal that Criminal Law Racognize a General Defense of Contributory Responsibility*, 8 BUFFALO CRIM. L. REV. 503, 504-505 (2005) (discussing the morally transformative nature of consent).

[50] *Id.*

[51] Chiesa, *supra* note 37.

[52] *See, e.g.*, People v. Gray, 224 Cal. App. 2d 76, 79-80 (Dist. Ct. App. 1964).

[53] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702 (1997) (discussing state laws banning assisted suicide).

is widely accepted as a defense to crimes against property. It has consistently been held that taking property does not constitute theft if the owner of the item consented.[54] Similarly, a defendant cannot be found guilty of criminal mischief if the owner of the property consented to its damage or destruction. Furthermore, since the owner has the right to do what he wishes with his property, he cannot be convicted of committing the offense of criminal mischief if he decides to damage his own property.[55]

2. Consent and Anti-Cruelty Statutes

The consent doctrine raises two important issues in the context of anti-cruelty statutes. The first matter warranting consideration is whether an animal owner's decision to inflict pain on a creature that rightfully belongs to him is (or should be) considered criminal. Also meriting consideration is whether someone who harms or kills an animal is (or should be) guilty of a crime if the owner of the creature consented to the act. The way in which we approach these issues will depend on the conception of anti-cruelty statutes that we adopt. On the one hand, the owner's decision to allow his animal to be harmed or killed should not generate criminal liability if one considers that the purpose of anti-cruelty statutes is to protect property rights. On the other hand, if one believes that the purpose of proscribing animal abuse is to protect animals from unjustifiable inflictions of pain, the owner's consent to the harmful conduct should be irrelevant.

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[54] *See, e.g.*, People v. Smith, 120 Cal. Rptr. 2d 831 (Ct. App. 2002); State v. Fahlk, 524 N.W.2d 39 (Neb. 1994).

[55] N.Y. PENAL LAW § 145.00 (McKinney 1999).

C. The Harm Principle

1. Preliminary Considerations

Closely related to the question of whether it is legitimate to punish people for committing a victimless crime is the doctrine that has come to be called the "harm principle." First elaborated by the famous philosopher John Stuart Mill, this principle has been employed as a means to limit the government's power to criminalize conduct. According to his formulation of the doctrine, "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[56] As a result of this, Mill concluded that the government could not legitimately prohibit an act solely to promote the physical or moral wellbeing of the person engaging in the conduct.[57] Furthermore, he asserted that the fact that most people consider the performance of a particular act to be wrong or unwise is not a sufficient reason to warrant criminalizing the conduct.[58]

Mill's thesis was later echoed and further developed by the legal theorist H. L. A. Hart. Hart believed that to prohibit conduct merely because it is considered immoral is illegitimate because doing so would contradict fundamental liberty interests.[59] He also stated that the distress people feel when others conduct themselves in what they consider to be an immoral fashion cannot constitute a punishable harm, since this would be "tantamount to punishing them simply because others object to what they do; and the only liberty that could coexist with this extension of the utilitarian principle [("harm principle")] is liberty to do those things to which no one seriously objects. Such liberty plainly is quite nugatory."[60] In other words, according to Hart,

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[56] JOHN STUART MILL, ON LIBERTY 10-11 (Elizabeth Rapaport ed., Hackett 1978).

[57] *Id.*

[58] *Id.*

[59] H. L. A. HART, LAW, LIBERTY AND MORALITY 47 (Stanford Univ. Press 1963).

[60] *Id.*

criminalizing acts because of their immorality is illegitimate because it assigns only trifling importance to the fundamental right of individual autonomy.[61]

One important consequence of the harm principle is that it casts doubt on the propriety of criminalizing an act merely because of its dangerousness. Prohibiting such conduct is problematic because "[t]hese offenses do not proscribe harm itself, but rather the *possibility* of harm—a possibility that need not (and typically does not) materialize when the offense is committed."[62] There are myriad examples of non-harmful acts that are considered criminal solely because they create risks of harms. Perhaps the most prevalent one is the criminalization of the unauthorized possession of a weapon. Although the mere possession of a weapon is not harmful to anyone, it presumably increases the risk that the possessor might use it to injure someone. The justifiability of making use of this type of offense as a way of neutralizing dangerous offenders before they engage in harmful conduct is unclear. It is safe to say, however, that the more concrete the risk sought to be prevented by the offense is, the more justifiable it is to criminalize the conduct. Conversely, as the inherent dangerousness of the conduct decreases, the reasons in favor of criminalizing the act get progressively weaker. Compare, for example, the relative merits of the decision to criminalize the possession of tools commonly used for criminal purposes with the prohibition of the possession of weapons. Whereas most people seem to believe that criminalizing the latter is justifiable, there are considerable doubts with regards to whether prohibiting the former is proper. The key to explaining this distinction lies in the inherent dangerousness of the items involved. Thus, it has been asserted that an "account of the difference between weapons . . . and burglary tools . . . is that the former are dangerous or thought to be dangerous to all

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[61] Luis E. Chiesa, *Normative Gaps in the Criminal Law: A Reasons Theory of Wrongdoing,* 10 NEW CRIM. L. REV. 102, 131 (2007).

[62] Douglas Husak, *Crimes Outside the Core,* 39 TULSA L. REV. 755, 771 (2004) (emphasis added).

those who might come in contact with them [whereas the latter are not]."[63] Since weapons pose a more serious risk of causing grave harm to others than tools, the decision to criminalize their possession is more defensible than the choice to prohibit possessing tools.

While the harm principle initially afforded courts and commentators with an effective tool with which to condemn the enactment of laws that were adopted to enforce public morality, the principle has been criticized because of the malleability and vagueness of the concept of "harm."[64] Many statutes that appear to prohibit conduct solely as a way of enforcing moral principles can be easily recast as enactments that aim to prevent the causation of indirect harm. Thus, Professor Catharine MacKinnon has argued that governmental regulation of pornography, once thought to be at odds with the harm principle, can be justified on morally neutral grounds because it is harmful to women since it perpetuates sexism, promotes the subjugation of women and fosters inequality.[65] In a similar fashion, former New York City Mayor Rudolph Giuliani justified his crackdown on sex shops and peep shows in Times Square by focusing on the indirect societal harm that they cause, not on their immorality.[66]

Despite its shortcomings, the harm principle serves to limit the government's power of criminalization by requiring that the state provide reasons for prohibiting conduct other than the fact that it is generally considered to be immoral. In some cases, the state can justify prohibiting conduct by pointing to its evident

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[63] GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 200 (Oxford Univ. Press 2000).

[64] *See generally* Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999).

[65] Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 7 (1985).

[66] *See* Mike Allen, *Giuliani Tells Sex-Based Shops That the End is Drawing Near*, N.Y. TIMES, July 20, 1998, *available at* http://query.nytimes.com/gst/fullpage.html?res=9406E4D61030F933A15754C0A96E958260&sec=&spon= (stating that Mayor Giuliani believed sex-based shops to be "'corrosive institutions' that destroy neighborhoods and discourage what he calls 'legitimate business.'").

dangerousness (drunk driving, for example) or by demonstrating that the long term benefits of proscribing what would otherwise appear to be an innocuous act justifies criminalizing such conduct (banning certain pornographic materials as a way of curbing sexism and discrimination, for example). However, the government will occasionally not be able to provide reasons for criminalizing conduct besides its perceived immorality. The prohibition of certain sexual acts provides a case in point. In the landmark decision of *Lawrence v. Texas*[67], for example, the United States Supreme Court had to decide whether a law making consensual sodomy a crime violated the liberty interests protected by the Fourteenth Amendment's Due Process Clause.[68] In language that closely mirrors Mill's formulation of the harm principle, the Court justified striking down the statute by pointing out that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[69]

2. The Harm Principle and Anti-Cruelty Statutes

The famous English jurist Lord Devlin once argued that anti-cruelty statutes were solely enacted as a way of publicly enforcing the widely shared view that unjustifiably inflicting pain on an animal is immoral.[70] If Lord Devlin's characterization of such laws is correct, criminalizing the mistreatment of animals would seem to violate the harm principle. This would cast doubt on the legitimacy of enacting such legislation.

Lord Devlin's conception of anti-cruelty statutes is by no means universally held. In a famous reply to Devlin, H. L. A. Hart pointed out that:

> It is too often assumed that if a law is not designed to protect

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[67] 559 U.S. 558 (2003).

[68] *Id.*

[69] *Id.* at 577 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986)).

[70] DEVLIN, *supra* note 45 at 17.

> one man from another its only rationale can be that it is designed to punish moral wickedness or, in Lord Devlin's words, "to enforce a moral principle." Thus it is often urged that statutes punishing cruelty to animals can only be explained in that way. But it is certainly intelligible, both as an account of the original motives inspiring such legislation and as the specification of an aim widely held to be worth pursuing, to say that the law is here concerned with the *suffering*, albeit only of animals, rather than with the immorality of torturing them. Certainly no one who supports this use of the criminal law is thereby bound in consistency to admit that the law may punish forms of immorality which involve no suffering to any sentient being.[71]

Thus, anti-cruelty legislation does not violate the harm principle, as long as we interpret the principle as one that allows for the justifiable imposition of punishment whenever the actor's conduct causes harm to *another sentient being*, that is, a human or animal.

III. The Interests Sought to be Protected by Anti-Cruelty Statutes: Five Plausible Theories

A. Protection of Property

1. The Case in Favor of Conceiving Anti-Cruelty Statutes as a Way of Protecting Property Interests

Professor Gary Francione recently stated that, "as far as the law is concerned, . . . animals are nothing more than commodities."[72] This has led him and many others[73] to conclude that, for all relevant legal purposes, animals are treated as

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[71] HART, *supra* note 59, at 34 (footnote omitted).

[72] Gary L. Francione, *Reflections on Animals, Property, and the Law and Rain Without Thunder*, 70 LAW AND CONTEMP. PROBS. 9, 9 (2007).

[73] See, *e.g.*, David N. Cassuto, *Bred Meat: The Cultural Foundation of the Factory Farm*, 70 LAW AND CONTEMP. PROBS. 59, 77 (2007).

property. As a result, this tempts the conclusion that the purpose of anti-cruelty statutes is to protect humans' property interests in animals.

The contention that the purpose of prohibiting abusive conduct against animals is to protect property rights finds some historical support. As was discussed in Part I of this article, cruelty to animals was not a crime at common law.[74] At the time, killing or harming an animal would be considered an offense only if doing so satisfied some other crime punishable at common law.[75] If any such offense were to be infringed, it would typically be a crime against property such as trespass or criminal mischief. Similarly, the first American anti-cruelty statute only made it punishable for someone to mistreat animals belonging to another person.[76] Therefore, the owner of the creature was originally free to inflict as much pain on the animal as he saw fit.

Recent enactments have generally broadened the scope of anti-cruelty offenses to nominally encompass the protection of most animals, including those that are not owned by anyone.[77] This might suggest that, contrary to their nineteenth century counterparts, modern anti-cruelty statutes protect interests other than property. It should be noted, however, that some aspects of these laws do seem to perpetuate the notion that anti-cruelty statutes are enacted primarily as a way of protecting private property. Consider, for example, how the protection afforded to certain animals, such as fish or birds, depends on whether they belong to someone or not. Most statutes generally authorize people to harm fish or birds if they do so while fishing or hunting.[78] Since no one has a claim of right over these animals while they are living in the wild, at least until they catch, trap or kill them, harming them does not affect any property interest. However, the legal protection afforded to these creatures

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[74] *See supra* Part I.

[75] *See supra* Part I.

[76] *See supra* note 14 and accompanying text.

[77] *See, e.g.*, N.Y. AGRIC. & MKTS. LAW § 353-a(1) (McKinney 2004).

[78] *See, e.g.*, IOWA CODE ANN. § 717B.2(5) (West 2003).

substantially increases once the animal belongs to someone. Thus, the acquisition of property rights over these kinds of animals has a significant transformative effect. Before they become private property, many people are free to harm them. However, once someone has a claim of right over the creature, no one, with the possible exception of the owner, can lawfully mistreat the animal.

It is worth mentioning that if the intended protection of anti-cruelty statutes is a property interest, the victim of such crimes would be the owner of the animal, not the creature itself. If conceived in this manner, these statutes should not be regarded as enacting a victimless crime. Furthermore, if the reason for criminalizing the mistreatment of animals is to avoid harm to property, the enactment of anti-cruelty statutes also satisfies the harm principle.

2. The Case Against Conceiving Anti-Cruelty Statutes as a Way of Protecting Property Interests

Even though a property-based conception of anti-cruelty statutes adequately explains certain features of these laws, it fails to account for some of their most distinctive characteristics. Consider the significant protection given to dogs and cats in most jurisdictions (mistreating a dog or cat is considered a felony in many states, whereas mistreating some other animal is not).[79] The increased degree of protection provided to these animals does not depend on whether someone owns them. Thus, torturing a stray dog is considered a felony in most states regardless of whether someone has a claim of right over the animal.[80]

Property-based conceptions of anti-cruelty laws are also difficult to reconcile with statutes that make it a crime to encourage dog or cockfighting. Such conduct is considered an offense

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[79] *See supra* note 18.

[80] *Id.*

in all fifty states.[81] Interestingly, the act remains criminal even if the owners of the animals voluntarily decide to engage in the activity.[82] Since these laws protect animals in circumstances in which doing so will be detrimental to the pecuniary interests of their owners, the protection conferred in this context is incompatible with the position that anti-cruelty statutes are primarily enacted as a way to advance property interests.

It should also be noted that every jurisdiction makes it criminal for the owner of a pet to mistreat his animal.[83] The adoption of this type of legislation is at odds with a property-based conception of anti-cruelty statutes because the unqualified protection afforded to pets against harmful acts of their owners is contrary to the general principle of property law that an owner has a right to do what he wishes to his property, including destroying or damaging it.

B. Protection Against Emotional Harm

1. The Case in Favor of Conceiving Anti-Cruelty Statutes as a Means of Protecting Humans Against the Infliction of Emotional Harm

It might be cogently argued that the chief purpose of anti-cruelty statutes is to prevent people from causing harm to persons with strong emotional ties to a mistreated animal. The "emotional harm" conception dovetails in several important respects with the property-based approach to animal cruelty laws.

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[81] 7 U.S.C.A. § 2156 (2006). *See, e.g.*, N.Y. AGRIC. & MKTS. LAW § 351 (McKinney 2004 & Supp. 2007). The only U.S. jurisdiction in which cockfighting is not considered a crime is Puerto Rico. The reason for this seems to lie in the cultural and historical significance that cockfighting has for many people on the island, particularly those who are over sixty and live in rural areas. *Id.*

[82] *See, e.g.*, IOWA CODE ANN. § 717B.3.A(1) (West 2003) (stating that a person is guilty of animal torture, regardless of whether the person is the owner of the animal).

[83] For information on the animal cruelty laws in each state, see Michigan State University College of Law, http://www.animallaw.info/statutes/topicstatutes/sttoac.htm (last visited Oct. 31, 2008).

Since the owners of animals often develop strong emotional ties to their animals, they will typically be the ones who suffer the most when someone unjustifiably harms their pets. Ownership, however, is not necessarily determinative of whether someone has developed a close emotional relationship with the animal. One can easily imagine instances in which the owner of the creature has no affective attachment to his pet. By the same token, one can conceive many instances in which someone other than the owner has cultivated a close sentimental link with the animal. As a result, ownership is typically, though not necessarily, indicative of a significant emotional bond with the animal. However, under this conception of anti-cruelty statutes, the ultimate purpose of these laws is to protect people from suffering emotional harm, not to safeguard their property interests.

The emotional harm approach to animal cruelty laws is particularly apt for explaining the heightened level of legal protection that is traditionally afforded to companion animals. According to the American Society for the Prevention of Cruelty to Animals (ASPCA), companion animals are "domesticated or domestic-bred animals whose physical, emotional, behavioral and social needs can be readily met as companions in the home, or in close daily relationship with humans."[84] This definition is similar to the ones adopted in the majority of jurisdictions in the United States.[85] Thus, by definition, companion animals are those creatures that are more likely to have close and significant ties with human beings.[86] Consequently, if one believes that the principal aim of anti-cruelty statutes is to prevent people from engaging in conduct that can sever the strong link that unites

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[84] ASPCA Policies and Positions 2.2, (2008), http://www.aspca.org/site/PageServer?pagename=pp_cn_definition (last visited Oct. 20, 2008).

[85] *See, e.g.*, CONN. GEN. STAT. ANN. § 22-351a (West 2001 & Supp. 2007); 510 ILL. COMP. STAT. ANN. § 70/2.01-a (West 2004); MINN. STAT. ANN. §343.20 (West 2004); N.Y. AGRIC. & MKTS. LAW § 350 (McKinney 2004 & Supp. 2007).

[86] People v. García, 777 N.Y.S.2d 846, 851-52 (Sup. Ct. 2004) (stating that one of the reasons why a goldfish is a companion animal is because such pets are beloved by their owners and are not to be killed or eaten).

animals and humans, it makes sense to protect companion animals more than other creatures.

So conceived, animal-cruelty statutes would seem to satisfy the harm principle, for the principal reason that criminalizing the conduct would avoid emotional harm to others. Furthermore, these statutes would not create victimless crimes, since there is a victim whose interests are vindicated by punishing those who infringe the norm against harming animals—the human with close ties to the creature.

This appeared to be the conception of animal cruelty laws that the lower court had in mind in *García*, when it seemed to suggest that the defendant's actions evinced an increased degree of cruelty because they were calculated to inflict suffering on the person with the closest emotional ties to the pet goldfish—Juan.[87] By focusing on the impact that the perpetrator's conduct had on the boy instead of the harm that the act caused to the animal, the court was clearly implying that the principal aim of the statute is to prevent human suffering, not to protect animals from unjustifiable inflictions of pain.

2. The Case Against Conceiving Anti-Cruelty Statutes as a Means of Protecting Humans Against the Infliction of Emotional Harm

The proposition that the purpose of anti-cruelty statutes is to protect humans from emotional harm cannot be easily reconciled with the broad scope of typical animal cruelty laws. Take, for example, South Dakota's animal cruelty statute.[88] This law makes it a crime to harm any "mammal, bird, reptile, amphibian or fish"[89] by engaging in any "act or omission whereby unnecessary, unjustifiable or unreasonable physical pain or suffering is caused, permitted or allowed to continue including acts of muti-

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[87] People v. García, 812 N.Y.S.2d 66, 71 (App. Div. 2006).

[88] S.D. CODIFIED LAWS § 9-29-11 (1995).

[89] § 40-1-1(2) (2002).

lation."[90] The statute protects many animals, like reptiles and amphibians, that typically do not have close, daily relationships with humans.[91] Giving legal protection to such animals is difficult to explain under an emotional harm approach to animal cruelty statutes. Furthermore, harming stray dogs or cats is considered a crime even if no one has developed a strong emotional bond with the animals. This is the case even if most or all members of the community despise the creature harmed. As far as the law is concerned, animals are deemed worthy of legal protection whether or not they are liked.

Finally, the emotional harm approach to animal cruelty statutes cannot satisfactorily account for the widespread prohibition of dog fighting and cockfighting.[92] Most of the people who participate in this type of activity treat the animals involved either as a source of income or as entertainment. Moreover, they are evidently aware of the fact that many of the animals will suffer great pain and/or death as a result of the fights. Since the people involved in these sports treat the animals involved as disposable objects that exist solely to generate money or pleasure, it cannot be said that the principal reason for criminalizing dog or cock fighting is to prevent psychological harm to those who have developed close ties to the animals. In these cases conduct is made criminal, *despite* the fact that the people generally associated with these events do not suffer when the animals are in pain. Typically, the opposite seems to be true: they *enjoy* watching the creatures suffer.

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[90] § 40-1-2.2 (2002).

[91] § 40-1-1(2) (2002).

[92] For a list of animal fighting statutes enacted in the United States, see Michigan State University College of Law, http://www.animallaw.info/statutes/topicstatutes/sttoaf.htm (last visited Oct.31, 2008).

C. Prevention of Future Harm to Humans

1. The Case in Favor of Conceiving Anti-Cruelty Statutes as a Means of Preventing Future Harm to Humans

Perhaps the mainstream belief with regard to animal cruelty statutes is that they are enacted as a way of identifying and neutralizing presumptively dangerous individuals before they engage in acts that are harmful to human beings.[93] The philosophical roots of the "future harm" view can be traced back to Immanuel Kant, who once famously stated, "he who is cruel to animals becomes hard also in his dealing with men. We can judge the heart of a man by his treatment of animals."[94]

Defenders of this approach to anti-cruelty statutes believe that criminalizing the mistreatment of animals is warranted because "[t]here is ample evidence to suggest that individuals who engage in acts of animal cruelty have a greater probability of committing acts of violence against people as compared to individuals who have no history of committing acts of violence against animals."[95] This conception is so prevalent that many organizations devoted to the protection of animals have defended it in an effort to justify the enactment of broader anti-cruelty legislation. The First Strike campaign of the Humane Society constitutes one such example. The purpose of this program is to reduce animal abuse by "rais[ing] public and professional awareness about the connection between animal cruelty and other violent crime violence and to help communities identify some of the origins of violence, predict its patterns, and prevent its escalation."[96]

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[93] *See, e.g.*, García v. People, 812 N.Y.S.2d 66, 68 (App. Div. 2006) (stating the concern with the connection between animal abusers and violence towards humans as a reason for enacting anti-cruelty statutes).

[94] Immanuel Kant, *Duties in Regard to Animals*, *in* ANIMAL RIGHTS AND HUMAN OBLIGATIONS 23, 24 (Tom Regan & Peter Singer eds., 2d ed. 1989).

[95] Charlotte A. Lacroix, *Another Weapon for Combating Family Violence: Prevention of Animal Abuse*, 4 Animal L. 1, 8 (1998).

[96] The Humane Society of the United States, First Strike: The Connection Between

There is significant evidence tending to demonstrate that a correlation between animal cruelty and interpersonal violence exists. Anecdotal confirmation of this link abounds. Some of the most famous serial killers, including Jeffrey Dahmer, the Son of Sam, the Boston Strangler and Ted Bundy had a history of abusing animals.[97] Empirical evidence also seems to substantiate the correlation. According to some studies, "animal abusers are five times more likely to commit violent crimes . . . [and] four times more likely to commit property crimes" than those who do not mistreat animals.[98]

Adoption of the future harm conception of animal-cruelty statutes should lead to punishing only those acts showing a correlation to interpersonal violence. This might explicate why it is typically not considered criminal to harm animals during the course of certain activities, such as fishing, hunting and farming. Since there is no significant link between engaging in these activities and violence against people, those who believe that animal-cruelty statutes should be adopted as a way of preventing future harm to humans do not have legitimate reasons for punishing this conduct.

The *García* court expressly recognized that one of the considerations that motivated the adoption of New York's anti-cruelty statute was the connection between animal abuse and violent crimes.[99] This was such a preeminent concern of lawmakers that then Governor Pataki defended the proposed amendments to the anti-cruelty statutes by pointing out that "gruesome acts [of torture endured by animals], coupled with recent studies that reveal a correlation between violence against animals and future acts of violence against humans, underscore

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Animal Cruelty and Human Violence, http://www.hsus.org/hsus_field/first_strike_the_connection_between_animal_cruelty_and_human_violence/ (last visited Oct. 15, 2008).

[97] Lacroix, *supra* note 95, at 8; Joseph G. Sauder, *Enacting and Enforcing Felony Animal Cruelty Laws to Prevent Violence Against Humans* 6 Animal L. 1, 14 n.114 (2000).

[98] Sauder, *supra* note 97, at 13.

[99] García v. People, 812 N.Y.S.2d 66, 68 (App. Div. 2006).

the need to enhance penalties for animal cruelty."[100]

2. The Case Against Conceiving Anti-Cruelty Statutes as a Means of Preventing Future Harm to Humans

According to the future harm conception of anti-cruelty statutes, the purpose of enacting laws criminalizing animal abuse is to identify dangerous individuals before they decide to harm a human being. If this were the case, the justifiability of adopting such laws would be questionable because doing so would violate the harm principle. Since the aim to prevent possible harm—future injury to humans—by criminalizing animal cruelty does not always transpire, it cannot be held that such conduct is prohibited because it causes direct harm to others, as the harm principle would require.

Furthermore, a legislature would be creating a victimless crime if it proscribed animal mistreatment solely because of its correlation with interpersonal violence. By ascertaining that the purpose of animal cruelty statutes is to avoid injury to a victim *in the future*, the legislature is implying that the perpetrator's present conduct does not yet interfere with personal interests. As was previously discussed, the legitimacy of prohibiting conduct that does not violate the rights of a victim is unclear.[101]

The future harm conception of anti-cruelty statutes inevitably leads to shifting the focus of these laws from avoiding harm to animals to neutralizing presumptively dangerous individuals. Therefore, as one commentator has suggested, the decision to criminalize abusive treatment of animals as a way to prevent possible future harm to humans is grounded on the "recognition that the solution to a violent society does not lie in the characterization of the victim but in the characteristics of the offender."[102] This might explain why the *García* court suggested

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[100] Jennifer S. Rosa, *Recent Development in New York Law*, 74 ST. JOHN'S L. REV. 287, 297 (2000) (quoting Governor George E. Pataki's Approval Memorandum 3, A. 8338-A signed as Chapter 118, 222nd Legis. Sess. (June 28, 1999)).

[101] *See supra* note 25 and accompanying text.

[102] Lacroix, *supra* note 95, at 3.

that the key to determining whether the defendant should be convicted of a felony because his act evinced a heightened degree of cruelty required an examination of his state of mind instead of an assessment of the amount of pain inflicted on the pet goldfish.[103] If the principal purpose of anti-cruelty laws is to prevent future harm to humans, the gradation of punishment for animal abuse should be dependent on the perceived dangerousness of the offender and not on the actual anguish endured by the creature. This is somewhat counterintuitive. Why should a finding of aggravated cruelty depend on anything other than an evaluation of the degree and extent of the suffering of the victim?

It is also worth mentioning that the future harm conception of laws proscribing animal abuse cannot satisfactorily account for two distinctive features of modern anti-cruelty legislation, namely, the criminalization of negligent mistreatment of pets and the prohibition of cockfighting. Empirical studies demonstrate that there is a correlation between intentional acts of cruelty against animals and interpersonal violence.[104] Thus, researchers have been quick to point out that many murderers have a history of intentionally harming animals by, for example, setting them on fire.[105] However, no proven link exists between negligent mistreatment of pets and future acts of violence against humans.[106] The person who carelessly forgets to arrange to have her pet fed during a vacation is guilty of animal abuse, despite the fact that performing such conduct does not substantially increase the likelihood that the pet owner will harm a human being in the future.

Similarly, participating in cockfighting is a crime although

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[103] García, 812 N.Y.S.2d at 71.

[104] *See supra* note 60 and accompanying text.

[105] Sauder, *supra* note 97, at 14.

[106] Stephen R. Kellert & Alan R. Felthous, *Childhood Cruelty Toward Animals Among Criminals and Non-Criminals*, *in* CRUELTY TO ANIMALS AND INTERPERSONAL VIOLENCE 194, 208 (Randall Lockwood & Frank R. Ascione eds., 1998). This study discusses intentional acts of violence against humans and the link with violent behavior towards animals, but does not suggest negligent treatment of animals has a link with future harm to humans.

the people involved in it are typically no more likely to engage in violent interpersonal crime than those who do not partake in such activities. The absence of a correlation between participation in cockfighting and violence against humans is particularly evident in the case of the many Latinos who view the practice of breeding and training fighting cocks as a family and cultural tradition.[107] It would be absurd to argue that the Latinos who participate in cockfighting are more prone to inflicting harm on humans than the average person. Thus, the future harm conception of anti-cruelty statutes is a particularly weak basis upon which to ground the criminalization of cockfighting. It seems obvious that such spectacles are banned in order to avoid unjustifiable harm to animals, not as a means of preventing future possible harm to humans.

D. Enforcement of Moral Views Held by a Majority of the Population

1. The Case in Favor of Conceiving Anti-Cruelty Statutes as a Means of Enforcing a Moral Principle

Various courts and commentators (most notably, Lord Devlin) have posited that the chief purpose of anti-cruelty legislation is to promote a moral view held by a majority of the population.[108] Proponents of the "public enforcement of morality" conception argue the perceived immorality of the conduct justifies its criminalization.[109]

This conception is appealing because most people *do* believe that unjustifiably inflicting harm on an animal is immoral. Thus, the elegance of this view lies in its simplicity. Why should

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[107] *See Cockfighting Still Popular in Puerto Rico*, WASHINGTON POST, Jan. 25, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/01/25/AR2007012500500.html (discussing cock fighting as a tradition and considered a gentleman's sport in country of Puerto Rico).

[108] Gary L. Francione, *Animals, Property, and Legal Welfarism: "Unnecessary" Suffering and the "Humane" Treatment of Animals*, 46 RUTGERS. L. REV. 721 (1994).

[109] *Id.*

we not criminalize that which most, if not all, deem to be a morally objectionable course of action?

Another advantage of the public enforcement of morality conception is that it can satisfactorily explain why it is generally not considered criminal to harm animals during the course of certain activities such as fishing and hunting. Since most people consider that fishing and hunting constitute instances of morally acceptable behavior, no moral principle would be promoted by proscribing such conduct.

This view of animal cruelty legislation also succeeds where most other approaches fail. The criminalization of dog fighting and cockfighting is easily explicable under this conception. These activities were not considered criminal in the past because at that time there was no clear consensus with regard to whether or not engaging in such behavior was deemed immoral. However, as time has passed and societal values have changed, different groups of people have coalesced in decrying the immorality of animal abuse. The crystallization of this moral consensus paved the way for the proscription of the conduct in modern times.

2. The Case Against Conceiving Anti-Cruelty Statutes as a Means of Enforcing a Moral Principle

The principal objection that can be leveled against the public enforcement of morality view of animal cruelty statutes is that most courts and commentators believe that the fact that a majority of the population believes that a certain act is immoral is not in itself a sufficient reason for criminalizing the conduct. The principle laid down by the Supreme Court in *Lawrence v. Texas* is worth repeating: "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[110]

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[110] Lawrence v. Texas, 539 U.S. 558, 577 (2003) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

Furthermore, this conception of anti-cruelty legislation is wholly incompatible with the harm principle.[111] Taking this principle seriously requires that we only proscribe conduct that interferes with the rights of others. However, no one has a right to have his own moral views publicly enforced by way of the criminal law. This is the case even when a person's moral principles coincide with those held by a substantial portion of the population. People should not have to endure punishment and the deprivation of liberty and/or property that it entails just because many object to his conduct on purely moral grounds. In a tolerant and pluralistic society, something in addition to the perceived immorality of the actor's conduct must be shown before we deem that person a criminal.

E. Prevention of Harm to Animals

1. The Case in Favor of Conceiving Anti-Cruelty Statutes as a Means of Preventing Harm to Animals

Perhaps the interest sought to be protected by anti-cruelty statutes is the prevention of harm to animals. After all, these laws are typically referred to as *animal* cruelty statutes. The view that these laws aim to protect animals from the unjustifiable infliction of pain has much to commend it. For starters, it seems to explain the most salient features of modern anti-cruelty legislation. The decisions to criminalize the negligent mistreatment of pets and to proscribe dog fighting and cockfighting can easily be accounted for under this conception. Since negligently mistreating animals causes them to suffer unnecessarily, it is perfectly sensible to proscribe such conduct in order to protect the creatures. Similarly, given that dogs and cocks used in fights endure incredible amounts of pain, there are legitimate reasons to prohibit the fights as a means of furthering the protection of the animals involved.

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[111] *See supra* Part II.C (discussing harm principle).

Moreover, contrary to the public enforcement of morality view, the conception of anti-cruelty statutes discussed in this section is compatible with the harm principle.[112] As H. L. A. Hart has rightly pointed out, criminalizing animal abuse does not violate this principle as long as we construe it in such a way that allows for the criminalization of conduct that harms a *sentient being*.[113] The proscription of conduct that interferes with the fundamental interests of others is universally held to be legitimate. Thus, provided that we consider animals to have interests worthy of legal protection, there should be no objection to prohibiting animal abuse. Fortunately, most people now believe animals have an interest in being held free from unnecessary suffering. This basic interest stems from an animal's *sentience*, that is, from their capacity to experience pain. Since our experience has led us to conclude that feeling pain is an unpleasant occurrence, we have good reason to abstain ourselves from causing pain to other beings, human or not.

As long as anti-cruelty statutes are conceived as laws that protect animals from enduring direct suffering, they would not constitute victimless crimes. So conceived, the legally protected victim would be the creature harmed by the perpetrator's conduct. Some would object to this conceptualization of victimhood by pointing out that only human beings should qualify as victims.[114] This argument would only hold, however, if there were some distinctive human characteristic beyond the capacity to feel pain that might justify affording humans more legal protection than animals. Professor Dubber believes human capacity for exercising meaningful autonomy over their lives warrants such a differentiated treatment.[115] The problem with this contention is that humans are considered victims *even if they lack the capacity to meaningfully exercise their autonomy*. A newly born child, for example, has no more capacity for autonomy than

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[112] *Id.*

[113] HART, *supra* note 59, at 34.

[114] *See generally*, DUBBER, *supra* note 36, at 158.

[115] *Id.*

a dog or a monkey. Nevertheless, if someone were to harm such a child, no one would seriously contend that he should not be considered a victim of a crime. So it would seem that, in cases such as these, the defining characteristic of victimhood is sentience, not autonomy.

Nonetheless, this does not mean there are never sound reasons for legally discriminating between humans and animals. It could be coherently argued, for example, that in light of their unique capacity for autonomy, humans should never be considered the property of anyone else. However, since animals presumably do not understand or care about notions of ownership, their interests in not being considered property are arguably weaker than interests humans have regarding the same issue.

Some scholars, like Gary Francione, argue there *is* such a thing as "animal autonomy" that should be considered worthy of legal protection.[116] If this were the case, the reasons for discriminating between animals and humans, at least with regard to questions about the legitimacy of owning such beings, disappear. However, one need not agree with this proposition in order to defend the notion that animals should qualify as victims. For this limited purpose, their capacity to feel pain appears to suffice.

2. The Case Against Conceiving Anti-Cruelty Statutes as a Means of Preventing Harm to Animals

The conception that anti-cruelty statutes are enacted as a way of protecting animals against the unjustifiable infliction of pain appears to conflict with certain features of these laws. Particularly difficult to explain under this view is the fact that it is not a punishable crime to harm an animal during the course of fishing or hunting activities. If these statutes really aim to prevent harm to animals, what superior interest might justify harming them during the course of fishing or hunting activities?

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[116] STEVEN M. WISE, DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS 43-45 (2002).

While it may be argued the economic and entertainment interests furthered by these activities justify harming animals, many will find these reasons for engaging in the conduct unsatisfying. However, one would be mistaken to conclude that, in light of these considerations, the purpose of animal cruelty statutes is not to protect animals. It might be argued that although these laws do in fact protect animals, they assign too much weight to countervailing interests that might justify an infraction of the prohibition. Thus, the problem does not lie with the purpose of the statute, which is by and large a salutary one, but with the scope of the reasons that might justify what would otherwise constitute a nominal infraction of the law. In order to fully understand this argument, a discussion of the structure of criminal offenses, generally, and of anti-cruelty statutes, in particular, is warranted.

IV. ACTIVITIES HARMFUL TO ANIMALS EXEMPTED FROM PUNISHMENT AND THE STRUCTURE OF CRIMINAL OFFENSES AND ANTI-CRUELTY STATUTES

A. The Claim

Since anti-cruelty statutes are riddled with exceptions allowing people to harm animals, animal law scholars frequently claim this demonstrates these statutes are enacted to ensure humans continue to exploit rather than protect animals.[117] Acceptance of this proposition typically leads to odd interpretations of animal cruelty laws. Take, for example, the views espoused by Professor Taimie Bryant in a recent article. In discussing the way in which the criminal law deals with cases involving harm caused to egg-laying chickens, she stated that:

> [T]he law does not identify as "cruel" the practices that directly cause their suffering. If the suffering of these hens is deemed

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[117] *See, e.g.*, GARY L. FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT 131-32 (1996).

> "necessary" for the eggs they supply to humans, then that suffering simply doesn't count in legal terms, nor does the suffering of the humans who care about that suffering."[118]

This reading misapprehends the conceptual structure of criminal offenses by confusing the inculpatory (whether the suffering of the hens "counts" as legally relevant harm) and exculpatory (whether there are reasons that justify the infliction of legally relevant suffering) dimensions of animal cruelty statutes. This, in turn, leads to a failure to grasp the communicative meaning of the exceptions that plague the laws prohibiting animal abuse.

In the remainder of this section, the structure of punishable crimes is explored in an attempt to (1) substantiate my contention the aforementioned reading of animal cruelty offenses is misguided and (2) demonstrate why it is not true that the exceptions that plague these laws reveal that they are primarily enacted to further human wellbeing rather than to protect animals from unjustifiable harm.

B. A Primer on the Conceptual Structure of Criminal Offenses

1. The Inculpatory vs. Exculpatory Dimension of Punishable Crimes and the Offense/Justification Distinction

Punishable crimes have both an inculpatory and an exculpatory dimension.[119] A person that engages in conduct that satisfies the elements of an offense inculpates himself.[120] Thus, David incriminates himself if he kills a human being, that is, he satisfies the elements of the offense of homicide. Furthermore, a person who has performed an act that satisfies the elements of an offense has engaged in conduct that is prima facie wrongful. Consequently, David's act of killing a human being is, all things

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[118] Taimie L. Bryant, *Trauma, Law and Advocacy for Animals*, 1 J. ANIMAL L. & ETHICS 63, 76 (2006) (emphasis added).

[119] *See, e.g.*, FLETCHER, *supra* note 63, at 562.

[120] *Id.*

being equal, prima facie unlawful.[121]

This, of course, does not mean that conduct that satisfies the elements of an offense is necessarily wrongful. An actor may escape liability, despite having inculpated himself by infringing the elements of an offense, if he can successfully plead a justification defense.[122] Therefore, if David can demonstrate that he acted in justifiable self-defense, he will not be punished even though he engaged in conduct that was prima facie wrongful. The presence of justificatory conditions such as self-defense or necessity transforms the actor's prima facie wrongful act into conduct that is, all things being considered, *not wrongful.*[123]

It should be noted that conduct may be considered lawful either because it does not inculpate the actor, that is, it does not satisfy the elements of an offense, or because it should be exculpated in light of the presence of circumstances which provide the actor with reasons for engaging in the prima facie wrongful act, namely, a justification defense. It would be a mistake, however, to conclude the actor's acquittal in both of these instances means the same thing. The next subsection will demonstrate the fundamental difference between conduct that is not wrongful because it does not satisfy the elements of an offense and conduct that is lawful because it is justified. This distinction proves to be crucial to a proper analysis of the structure and meaning of anti-cruelty offenses.

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[121] *See* Luis Ernesto Chiesa Aponte, *Normative Gaps in the Criminal Law: A Reasons Theory of Wrongdoing*, 10 NEW CRIM. L. REV. 1, 117-18 (2007).

[122] An actor can also avoid liability by pleading an excuse defense such as insanity.

[123] Albin Eser, *Justification and Excuse: A Key Issue in the Concept of Crime*, *in* 1 JUSTIFICATION AND EXCUSE: COMPARATIVE PERSPECTIVES 17, 37 (George P. Fletcher & Albin Eser eds., 1987).

2. The Communicative Significance of the Offense/Justification Distinction

a. Harmful vs. Non-Harmful Legal Conduct

The communicative significance of the offense/justification distinction can be illustrated by examining the difference between the acts of shooting at a piece of paper and shooting at a person in self-defense.[124] The act of shooting at a piece of paper is lawful because it does not satisfy the elements of an offense made criminal by our laws. Since this conduct is not prohibited, engaging in it does not cause harm to an interest protected by law. Thus, the act of shooting at a piece of paper, like any other conduct that does not satisfy the elements of an offense, is irrelevant for the criminal law.

Shooting at a human being in self-defense is also lawful. However, in contrast with the act of shooting at a piece of paper, this conduct satisfies the elements of assault.[125] Given that this conduct is prohibited, performing it interferes with a physical integrity interest that is otherwise protected by the law. Obviously, the injury caused to the person who was shot counts as harm as far as the law is concerned. Therefore, the act of shooting at a person is *relevant* for the criminal law, *even though it is not wrongful* since self-defense is a *justificatory circumstance.*

As one can see, these acts are lawful due to very distinct reasons. The act of shooting at a piece of paper does not satisfy the elements of an offense, because it does not cause harm to an interest the law seeks to protect. Hence, the law does not provide us with reasons to abstain from engaging in the act. Contrarily, the act of shooting at a person in self-defense satisfies

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[124] This is a variation of an example proposed by Hans Welzel, one of the greatest German criminal law scholars of the twentieth century, as a way to illustrate the offense/justification distinction. HANS WELZEL, DERECHO PENAL ALEMÁN 97-98 (Juan Bustos Ramírez & Sergio Yáñez Pérez trans., Editorial Juridica de Chile 4th ed. 1997).

[125] This, of course, assumes that the person did not die as a result of the conduct. If he had died, then the act would satisfy the elements of the offense of homicide.

the elements of the offense of assault and injures one of the most important interests protected by criminal law. Since this conduct is harmful, the law provides us with sound reasons not to engage in the act (protecting life or physical integrity), *even if doing so would be justified.*

b. Reasons and the Offense/Justification Distinction

Another way of making sense of the offense/justification distinction is by examining the different manner in which these categories seek to mold human conduct. By criminalizing offenses, society aims to provide people with reasons against engaging in the prohibited course of action.[126] Take, for example, the offense of arson. When the act of setting property of another on fire without his consent is prohibited, the citizenry has a sound reason against engaging in this type of conduct. Thus, if Randy were to ask Ralph whether he should burn down Sasha's cornfield, Ralph could coherently point to the fact that doing so would satisfy the elements of a criminal offense as a sound reason for Randy not to engage in the conduct.

Contrarily, the law provides no reason against engaging in conduct that does not constitute of an offense. Thus, the law provides no reason that can be advanced against Sasha's decision to burn down his own cornfield in order to build a barn, for this conduct does not satisfy the elements of an offense.[127] Although people might have a myriad of grounds for opposing Sasha's decision to burn down his cornfield, they cannot claim that such grounds make Sasha's decision to perform the conduct illegal.

Justifications, on the other hand, do not provide us with reasons to abstain from performing a given act. When we recog-

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[126] Gardner, *supra* note 14, at 822 (stating that prohibitory norms provide us with reasons "not to perform the prohibited act" and, by way of example, that the "norm that prohibits promise-breaking . . . is [among other things] a reason not to break promises").

[127] The conduct satisfies neither the elements of the offense of arson nor criminal mischief, for both of these offenses require that the property that is destroyed (criminal mischief) or set on fire (arson) belong to another.

nize the existence of a justification, we aim to provide people with sound reasons *in favor* of engaging in conduct that satisfies the elements of an offense. Hence, justifications provide us with "legally admissible reason[s] in favour of [acting in] nonconformity with the norm."[128]

Suppose, for example, that Randy now asked Ralph whether he could burn down Sasha's cornfield in order to create a firebreak that will prevent three homes from being engulfed by flames. This time, Ralph could respond by stating that the existence of justificatory circumstances (necessity/choice of evils) provide Randy with sound reasons to burn down the cornfield, even if engaging in such conduct infringes the elements of the offense of arson.

It should be noted, however, that the fact that justifications provide us with good reasons for engaging in the conduct does not mean that the reasons that the offense provides against performing the conduct magically disappear.[129] Thus, it has been stated that:

> When someone pleads a justification, she is claiming that the reasons in favour of doing as she did stand undefeated by the reasons against. The reasons against are those that make what she did an offence. *They have not gone away. They still make it an offence.* But the reasons in favour prevail and make it a justified offence (and hence one of which she should be acquitted).[130]

Since the reasons that the offense provides for abstaining to engage in the act are not swept away by the existence of justificatory circumstances, some residual reasons for not performing the conduct remain *even if the act is ultimately justified.* Consequently, although necessity provides Randy with good reasons for burning down Sasha's cornfield, the fact that doing so in-

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[128] Gardner, *supra* note 14, at 822.

[129] Kenneth Campbell, *Offence and Defence*, *in* CRIMINAL LAW AND JUSTICE: ESSAYS FROM THE W.G. HART WORKSHOP, 1986 73, 83 (I.H. Dennis ed. 1987).

[130] Gardner, *supra* note 14, at 819 (emphasis added).

fringes the elements of the offense of arson still provides us with some residual reasons against performing the justified conduct. However, given that these residual reasons (saving the cornfield) are not of sufficient force to outweigh the reasons in favor of engaging in the conduct that the existence of justificatory circumstances provide (saving three homes), burning down Sasha's cornfield in such a case cannot be considered criminal.

C. Regrettable vs. Non-Regrettable Lawful Acts

While residual reasons against performing an act that constitutes an offense do not afford us with sufficient grounds to criminalize the conduct if it is justified, they do provide us with sound reasons to feel regret for having engaged in the conduct. We have cause to regret the conduct because, all things being considered, "[i]t would have been better . . . had there been no occasion to commit [the act], . . . whether its commission was justified or not."[131] Therefore, justified conduct, although lawful, is regrettable, for the harm that the infraction represents is not wiped away merely by the existence of justificatory circumstances.

In a recent article, Professors Michelle Dempsey and Jonathan Herring convincingly argued that "[j]ustified prima facie wrongdoing leaves a moral residue of regret" and that regret produced has significant "rational force."[132] This regret has rational force because it generates reasons "to prefer less wrongful alternatives to securing the values that justify the prima facie wrongful conduct."[133]

Suppose, for example, that the law does not impose a duty to retreat as a prerequisite to the use of justifiable force in self-defense. In such a jurisdiction, Sandra could justifiably kill Laura in order to repel her unlawful deadly attack, even if she

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[131] *Id.* at 820.

[132] Michelle Madden Dempsey & Jonathan Herring, *Why Sexual Penetration Requires Justification*, 27 OXFORD J. OF LEGAL STUD. 467, 488 (2007).

[133] *Id.*

could have avoided injury by retreating to a safe place. However, since the act of killing Laura satisfies the elements of the offense of homicide, Sandra has a good reason (saving Laura's life) to abstain from the justifiable conduct. Although the reasons against engaging in the conduct that the offense represents are not of sufficient weight to make Sandra's justifiable use of deadly force criminal, these reasons do provide her with motives to regret killing Laura. Furthermore, these residual "regret-causing motives" afford Sandra with reasons to attempt to avert the unlawful attack by retreating, *although it would not be criminal for her to repel the attack by killing Laura in self-defense.* Curiously, the reason that the offense provides against killing Laura in self-defense in the first place—the protection of human life—is the same reason that counsels in favor of attempting to avert the attack by less harmful alternatives.[134]

Conversely acts that do not satisfy the elements of an offense do not generate reasons to regret the conduct. As a result, a person who engages in conduct that does not constitute an offense has no reason for seeking less injurious alternatives in order to achieve whatever it is that he or she aims to accomplish by performing the act. For instance, the law does not afford someone who shoots at a piece of paper reasons to feel regret for having engaged in the conduct. Accordingly, there is no reason for a person to attempt to make use of other, less harmful means in order to achieve whatever he or she aims to accomplish by shooting at the piece of paper (target practice, for example).

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[134] Dempsey and Herring illustrate the rational force of regret by way of the following example:

> Surgical cutting into a patient's body is a prima facie wrong, but one that may be justified in virtue of reasons generated *inter alia* by the value of the patient's life and well-being. Despite its justification, however, cutting into a patient's body is still to be regretted. This regret generates reasons for medical personnel to seek less wrongful alternatives to securing the values sought by the surgery. If, for example, the purpose of the cutting is to perform exploratory surgery in hopes of diagnosing a source of the patient's abdominal pain, it is rationally incumbent upon the surgeon to seek less wrongful alternatives to diagnosing the source of the pain before cutting into the patient's body.

Id. at 488-89.

3. The Supra-Statutory Nature of the Offense/Justification Distinction

On some occasions, the positive law clearly distinguishes between offenses and justifications. This is typically the case with regard to conduct that is regulated in the comprehensive penal codes of most jurisdictions. Usually, criminal codes are divided into a "special part" and a "general part." The special part contains offenses, the commission of which is regarded as prima facie wrongful. The general part, on the other hand, contains a series of general doctrines of criminal responsibility that, in principle, apply to every commission of an offense.[135] Here, one can typically find provisions that deal with the exculpatory dimension of criminal offenses and, consequently, with justification defenses.

Since the special part of penal codes contains a long list of offenses and the general part usually contains a catalogue of justification defenses (self-defense, necessity, law enforcement duties, etc.), the offense/justification distinction is often clearly reflected in the statutory law of any given jurisdiction. The New York Penal Law, for example, distinguishes between "general provisions" (i.e. the "general part") and "specific offenses" (i.e. the "special part").[136] Thus, the list of acts that are deemed to be prima facie illegal are regulated in the "specific offenses" part of the Penal Law, whereas the justificatory circumstances that permit what would otherwise constitute an unlawful act are provided in the "general provisions" section of the code.[137]

Such an organizational structure of penal laws typically

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[135] Thus, the general part of many criminal codes contains provisions with regard to basic doctrines of criminal law, such as the "act requirement," the forms of culpability (i.e. intent and negligence), attempt liability, perpetration and complicity, etc. *See generally* FLETCHER, *supra* note 63, at 393-95.

[136] N.Y. PENAL LAW pts. I, III (McKinney 2004). New York Penal Law contains an additional part that is intended to regulate sentencing practices. *See* N.Y. PENAL LAW pt. II (McKinney 2004).

[137] § 35 (defenses of justification listed in "general provisions"); §§ 120-275.45 (illegal acts listed in "specific crimes" section of code)

makes it easier to differentiate between offenses and justifications. As an example, an examination of New York law reveals that whoever kills a human being in self-defense has committed the offense of homicide.[138] Given that this conduct constitutes an offense, there are sound reasons against engaging in the act. In spite of this, the use of force in self-defense is not criminal pursuant to New York law because it is justified.[139] Thus, although the fact that such conduct satisfies the elements of an offense provides reasons to abstain from engaging in the act, the existence of justificatory circumstances makes this conduct, on balance, not wrongful.

Unfortunately, legislative appearances can sometimes be deceiving, for criminal statutes do not always clearly differentiate between conduct that is legal because it does not satisfy the elements of an offense and conduct that is legal because it is justified. The California Penal Code provision defining murder is a chief example. According to the code, "[m]urder is the *unlawful killing* of a human being . . . with malice aforethought."[140] What makes this provision problematic is that it infelicitously conflates the inculpatory and exculpatory dimensions of the crime by specifying that murder is an "unlawful killing."[141] Since justified killings are, by definition, lawful, it follows that deaths that are produced as a result of the justifiable use of force do not satisfy California's definition of murder. At first glance, one might be tempted to conclude that, in California, causing the death of a person in self-defense *is lawful because it does not satisfy the elements of murder.* Therefore, it might be argued that a person who kills another in self-defense has committed no prima facie wrong that is in need of justification.[142]

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[138] §125.00.

[139] §35.15.

[140] CAL. PENAL CODE §187(a) (West 2008) (emphasis added).

[141] *Id.*

[142] According to this reading, justifications (i.e. self-defense) would constitute *negative elements of the offense*, rather than independent defenses that negate the wrongfulness of the conduct without negating the elements of the offense. Some European scholars maintain this is the best way to interpret criminal statutes. *See, e.g.*, DIEGO MANUEL

Although seductive, this understanding of the offense/justification distinction is either wrong or profoundly unilluminating. If the distinction is to be of any consequence, offenses and justifications ought to be understood as conceptual categories that help us to better appreciate the general structure of punishable crimes, not as labels that can be legislatively defined in such a way that distinguishing between these categories would be a worthless endeavor. The reason so much attention has been paid to the offense/justification dichotomy in this article is because we can learn something about the law, morality and society by understanding the distinction. Thus, by using the terms "offense" and "justification," I am making broad claims about the nature and structure of punishable crimes in our society, not about the particular way in which legislatures such as California have sloppily drafted their murder statutes (or any other criminal statutes).

Therefore, the offense/justification distinction is supra-statutory in nature. According to this understanding of the distinction, which is widely shared by criminal theorists and legal philosophers, the way in which a statute has been drafted is not determinative when ascertaining whether conduct should be considered lawful because it does not constitute an offense or because it is justified.[143]

Since the statutory formulations of crimes can sometimes be misleading, it is necessary to elaborate supra-statutory standards that allow us to distinguish between conduct that is lawful because it does not satisfy the elements of an offense and

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LUZÓN PEÑA, CURSO DE DERECHO PENAL PARTE GENERAL I 302-03 (Universitas 1996). This position, however, has been convincingly criticized by numerous scholars. *See generally* FRANCISCO MUÑOZ CONDE & MERCEDES GARCÍA ARÁN, DERECHO PENAL PARTE GENERAL 252-53 (Tirant Lo Blanch 2004).

[143] This view was forcefully defended by the leading German criminal theorist Hans Welzel, who stated that whether the legislature decides to incorporate the criteria of justification into the definition of a crime is "irrelevant" to distinguishing between the offense and the justification. WELZEL, *supra* note 124, at 96 (asserting that "even if self-defense were to be included [as part of the definition of the crime of homicide] . . . the non-existence of the defense would not be transformed into a 'negative' element of the offense" (translation by author)). *Id.*

conduct that is lawful because it is justified. In my opinion, this can be accomplished by appealing to the ideas that undergird the different ways of understanding the offense/justification distinction that have been elaborated in this section.

Previously, the communicative significance of the "offense" and "justification" categories was demonstrated by appealing to three different notions—harmful versus non-harmful lawful acts, reasons against and in favor of performing an act, and regrettable versus non-regrettable lawful conduct.[144] These notions can serve as heuristic devices that aid us in the sometimes difficult endeavor of distinguishing between offenses and justifications, particularly when the statutory law does not provide much guidance.

Thus, regardless of how legislatures decide to draft their criminal statutes, a useful way of distinguishing between different types of non-wrongful acts is by asking ourselves the following questions:

> (1) Is the conduct lawful because: (a) no harm has been caused, or (b) although harm has been caused, the benefits that result from the conduct outweigh the harm produced by the conduct?
>
> (2) Is the conduct lawful because: (a) there are no reasons to refrain from performing it, or (b) although there are reasons against engaging in the conduct, they are outweighed by reasons in favor of performing the conduct?
>
> (3) Do we have reasons to attempt to make use of other, less harmful means in order to achieve what we aimed to accomplish by engaging in the lawful act?—(a) no, because there are no reasons to regret having engaged in the act, or (b) yes, because there are reasons to regret having engaged in the act?

If the answer to the three questions is (a), then the conduct is lawful because it does not satisfy the elements of an offense. On the other hand, if the answer to these questions is (b), the

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[144] *See supra* Part IV.B.2.

conduct is lawful because it is justified.

These questions provide guidance when determining whether a killing in self-defense is not wrongful because it does not satisfy the elements of an offense or because it is justified. As was previously stated, the California murder provision suggests that such killings are lawful because they do not satisfy the elements of an offense.[145] This conclusion, however, is misguided, given that:

> (1) The conduct is lawful because, although harm has been caused (death of the aggressor), the evil wreaked by the conduct is outweighed by the evil avoided by the conduct (death of person unlawfully attacked).
>
> (2) The conduct is lawful because, although there are reasons against engaging in the conduct (protecting the life of the aggressor), they are outweighed by reasons in favor of performing the conduct (protecting the life of the person attacked).
>
> (3) We have reasons to attempt to use other, less harmful means in order to achieve what we aimed to accomplish by killing the aggressor in self-defense (by retreating, for example) because there are reasons to regret having killed the aggressor.

C. The Structure of Anti-Cruelty Offenses

1. The Ambiguity of Animal Cruelty Laws

Now that we have explored the general structure of punishable crimes, we are in a better position to understand the particular structure of anti-cruelty statutes. Anti-cruelty laws, like other criminal statutes, have an inculpatory and exculpatory dimension. Thus, a reading of these laws reveals that they purport to both describe conduct that society considers to be prima facie wrongful and to illustrate circumstances in which engaging

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[145] *See supra* note 140-42 and accompanying text.

in such conduct is, all things being considered, non-wrongful. In other words, anti-cruelty statutes contain both definitions of offenses and a catalogue of justifications. The problem, however, as anyone who has read up to this point would probably suspect, is that these laws do not clearly differentiate between conduct that is not wrongful because it does not satisfy the elements of an offense and acts that are lawful because they are justified.

Take, for example, the Montana anti-cruelty statute which criminalizes a variety of acts, such as "injuring" or "killing" an animal.[146] However, it also states that "[t]his section does not prohibit [injuring or killing an animal as result of] . . . commonly accepted agricultural . . . practices."[147] The combined effect of these two provisions is unclear. There are a couple of plausible interpretations of this statute:

> (1) Injuring or killing an animal as a result of lawful agricultural practices is not prohibited (i.e., is "lawful") because doing so does not satisfy the elements of an offense; or
>
> (2) Injuring or killing an animal as a result of lawful agricultural practices is not prohibited because, although doing so satisfies the elements of an offense, it is justified.

Similar ambiguity plagues the Texas anti-cruelty statute which holds intentionally or knowingly torturing livestock a crime.[148] However, "[i]t is a defense to prosecution . . . that the actor [harmed the animal as a result of being] engaged in bona fide . . . scientific research."[149] Once again, there are two possible interpretations of this statute:

> (1) Torturing an animal for bona fide scientific experimentation is not prohibited because doing so does not satisfy the elements of an offense, or

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[146] MONT. CODE ANN. § 45-8-211(1)(a) (2007).

[147] § 45-8-211(4)(b).

[148] TEX. PENAL CODE ANN. § 42.09(a)(1) (Vernon Supp. 2007).

[149] *Id.* §42.09(e).§42.09(e).

(2) Torturing an animal for bona fide scientific experimentation is not prohibited because doing so is justified.

How should we determine which of the plausible readings of the Texas and Montana statutes[150] represents the best interpretation of animal cruelty laws?[151]

One possible way to tackle this matter would be to look for answers by parsing the statutory text. Some might believe, for example, that the fact that the Texas statute states that "it is a defense" to prosecution when the harm was caused as a result of scientific experimentation implies that this conduct is justified, for justifications are defenses to crimes. Furthermore, it might be argued that since the Montana statute asserts that it does not prohibit injuring animals as a result of common agricultural practices, engaging in such conduct does not even satisfy the elements of the offense.

This type of analysis strikes me as formalistic and unenlightening. It is clear these statutes purport to exclude certain activities that are harmful to animals (scientific experiments and agricultural practices) from the reach of the criminal law.[152] However, that much should not be read into the specific way in which legislatures have drafted such exceptions. Whether a statute declares the lawfulness of such conduct by asserting that it is a defense to the crime or by claiming that the act is not prohibited by the law is immaterial to the question about whether the legality of the conduct stems from the fact

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[150] Since the Montana and Texas anti-cruelty statutes are representative of most animal cruelty laws in the United States, additional examples of the problems of interpretation that these statutes entail are not needed.

[151] Some might argue the answer to this question is of little significance, for, in any case, the aforementioned conduct is lawful regardless of whether it does not constitute an offense or is justified. This argument fails to grasp the communicative significance of the offense/justification distinction. It surely is not trivial whether society considers that injuring an animal as a result of scientific or agricultural practices has more in common with the act of shooting at a piece of paper (conduct that does not constitute an offense) than with the act of shooting a person in self-defense (justifiable conduct). Therefore, it seems to me that attempting to find an answer to this question is warranted.

[152] *See supra* notes 146-49 and accompanying text.

that it does not constitute an offense or from its justifiable nature.

Since the offense/justification distinction is supra-statutory in nature, a more satisfying answer to this question can be obtained by appealing to the heuristic devices described in the previous subsection.

2. Harm, Reasons and Regret in Anti-Cruelty Statutes

a. Harmful Legal Acts and Anti-Cruelty Statutes

As this article has discussed, there is clearly a difference between non-harmful and harmful legal acts. Conduct that does not satisfy the elements of an offense does not typically cause harm (e.g., shooting at a piece of paper). However, justified conduct usually causes harm, although the harm avoided by engaging in the act is greater than the one inflicted (e.g., shooting at a person in self-defense). Thus, the first question when examining the nature of the exemption from punishment for persons who injure animals (e.g., pursuant to scientific or agricultural practices) is whether those acts are lawful because they do not cause harm or because the harm inflicted is outweighed by the benefits reaped from engaging in the conduct. The following examples might help us to answer this question.

> (1) Judy dislocates a rabbit's neck because she enjoys seeing animals suffer.
>
> (2) Judy dislocates a rabbit's neck pursuant to a bona fide scientific experiment.
>
> (3) Judy dislocates a rabbit's neck in order to slaughter the creature and sell it in a commercial establishment pursuant to local laws.

The conduct in example (1) is clearly criminal under most, if not all, modern anti-cruelty statutes. Thus, the harm that is caused to the rabbit is most certainly relevant in the criminal law. The conduct in example (2), on the other hand, is almost

undoubtedly lawful under traditional animal cruelty statutes. It would be misguided, however, to believe the legality of such conduct stems from the fact that the harm caused to the rabbit is legally irrelevant. As example (1) demonstrates, the infliction of harm to rabbits matters in the criminal law. It would thus be odd to assume that if the rabbit was injured pursuant to a bona fide scientific activity that magically erases the harm caused to the creature.

Consequently, it makes better sense to conclude that the exemption from punishment afforded in example (2) is the product of a determination that the conduct is lawful because the harm endured by the animal is outweighed by the potential benefits of engaging in the scientific experimentation. Of course, one might disagree with the relative value that the law assigns to the interests in conflict in such cases. Many, including myself, believe the harm caused to the rabbit should be given much more weight than is currently the case.[153] However, this disagreement does not prove that the injury caused to the rabbit in such cases does not "count" as harm under the criminal law. It merely demonstrates that such harm does not "count" as much as I, and most animal law scholars, believe that it should.

The conduct in example (3) should be treated in much the same way as the conduct in example (2). There is nothing magical about food production that makes the harm caused to the rabbit in example (3) any different from the harm caused to the animal in example (1). The harm caused in both cases is identical: the dislocation of a rabbit's neck. The infliction of this harm, *qua* harm, remains unwelcome. However, the conduct in example (3) is lawful because the benefits generated by the conduct (production of food) are deemed to outweigh the harm caused to the animal.

An examination of these hypotheticals reveals that the reason why injuring an animal pursuant to agricultural or scientific activities is lawful is *not* because doing so does not constitute an

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[153] *See generally* Bryant *supra* note 118.

offense, for such acts harm an interest protected by the criminal law. These acts are legal because they are justified, for, even though the harm they cause matters in the criminal law, it is (rightly or wrongly) outweighed by countervailing considerations.

b. "Reasons" and Anti-Cruelty Statutes

Another way of probing the structure of animal cruelty statutes is by examining whether persons who harm animals pursuant to certain enumerated activities act lawfully because there are no reasons for prohibiting such conduct or because, despite there being reasons against performing such conduct, they are outweighed by the reasons in favor of engaging in the conduct. If the former explanation for the lawfulness of the conduct is accurate (i.e., there are no reasons against performing the act), then it should be concluded that harm to animals as a result of scientific or agricultural activities does not constitute an offense. However, if the latter explanation for the lawfulness of the conduct is correct (i.e., the reasons in favor of performing the act outweigh the reasons against), then engaging in such acts is lawful because it is justified. An examination of the examples put forth in the previous subsection is once again useful to a discussion of these matters.

Example (1) demonstrates that animal cruelty statutes provide reasons against injuring animals.[154] If Judy were to ask Andy whether she should dislocate a rabbit's neck, Andy would be able to point out that anti-cruelty statutes give her good reasons to abstain from doing so. In other words, such statutes provide us with prima facie reasons against injuring an animal. On the other hand, examples (2) and (3) show that animal cruelty statutes also provide us with reasons in favor of harming animals (scientific experiments and food production) that might outweigh the prima facie reasons that the law provides against

[154] *See* examples *supra* Part IV.C.2.a.

engaging in such conduct (keeping animals free from harm).[155]

It should be noted, however, that it invites confusion to state that the presence of reasons in favor of performing the conduct wipes away the reasons against engaging in it. It would be misleading to assert that the law provides no reasons against dislocating a rabbit's neck if such harm takes place as a result of scientific experimentation or food processing practices. It makes better sense to conclude that, despite the fact that we have good reasons not to dislocate a rabbit's neck, those reasons are outweighed if the injuries occur pursuant to certain lawful activities.

These reflections corroborate that engaging in conduct that falls within an exception to an anti-cruelty statute is lawful because it is justified, not because it does not constitute an offense. Consequently, although the law affords Judy with valid grounds to injure an animal pursuant to scientific or food processing activities, the fact that doing so constitutes an offense still provides her with residual reasons against performing the justified conduct. However, given that these residual reasons (e.g., keeping the animal free from harm) are not of sufficient weight to counterbalance the reasons in favor of engaging in the act, which the presence of justificatory circumstances provides (e.g., scientific advancement, food processing), dislocating the rabbit's neck is considered legal in such circumstances.

C. Regret and Anti-Cruelty Statutes

The residual reasons that remain against harming an animal even in circumstances when doing so would be justified pursuant to some lawful activity provide sufficient motives to regret causing the harm, even if doing so was justifiable. The rational force of such regret should lead persons to seek other, less harmful alternatives to achieving the ends that they aimed to accomplish by injuring animals.

Thus, Judy should first attempt to obtain whatever knowl-

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[155] *Id.*

edge she wishes to attain by injuring the rabbit by engaging in scientific experiments that do not involve harm to animals. I think that this belief is shared by most people. Even if the majority of the population believes that it is justifiable to harm animals in order to advance science, many people are disturbed by the suffering that such activities cause to animals. It is fair to say, the bulk of the populace regrets the harm inflicted on these animals and would thus prefer that, if possible, other less injurious alternatives be used in order to achieve scientific advancement. Similarly, we have reason to regret harm to animals pursuant to food processing activities. As a result, most people would probably prefer that those in charge of engaging in such activities seek the least harmful methods to achieve the desired end.

The fact that we have good reason to regret harming animals pursuant to scientific and agricultural activities buttresses the conclusion that engaging in such conduct is lawful because it is justified, not because it does not satisfy the elements of an offense. As stated before, conduct that is lawful because it does not satisfy the elements of an offense (e.g., shooting at a piece of paper) is typically not regrettable. However, conduct that is lawful because it is justified (e.g., shooting a person in self-defense) is generally regrettable. Thus, it makes more sense to conclude that injuring an animal in order to advance scientific knowledge or to produce food has more in common with the act of shooting at a person in self-defense than with the act of shooting at a piece of paper.

As has been discussed, both the acts of harming an animal pursuant to an exempted activity and of shooting a person in self-defense inflict harm that is relevant for the criminal law. Furthermore, these acts are lawful because the reasons in favor of performing them outweigh the reasons against performing them, not because there are no reasons to abstain from performing the acts in the first place. As a result, there are reasons to regret both harming animals and shooting human beings, even if doing so would be justifiable. This, in turn, generates reasons to choose less injurious alternatives in order to attain the end sought by persons engaging in the justified conduct.

The following table summarizes the conclusions that have been advanced up to this point:

Table 1. The Structure and Communicative Meaning of Anti-Cruelty Statutes

Categories	**Act-Description**	**Communicative Significance**
The Offense	Causing injury to a non-human animal.	A person who commits the offense has: • harmed an interest that the criminal law seeks to protect; • performed conduct that is, all things being equal, wrongful; • engaged in conduct that he or she has reasons to refrain from performing; • performed conduct that we have reason to regret.
The Justifications	• Bona fide Scientific Experimentation; • Farming, Agricultural and Food Processing Practices; • Hunting, Fishing, and Trapping Practices; • Pest Control; • Others.	A person who justifiably commits the offense has: • harmed an interest that the criminal law seeks to protect, but the harmed caused is outweighed by the benefits generated by the conduct; • performed conduct that is, all things being considered, not wrongful; • reasons for engaging in the conduct that outweigh the reasons against performing the conduct; • performed lawful conduct that he or she nevertheless has reasons to regret.

D. Why the Animal Law Scholars' Claims Are Wrong

An understanding of the conceptual structure of anti-cruelty offenses reveals that the interpretation of such laws typically espoused by animal law scholars is misguided. Once one differentiates between the inculpatory (the offense) and exculpatory (the justifications) dimensions of these laws, one can see why it is not true that, as Professor Bryant has argued, the harm caused to animals as a result of the activities that are exempted from punishment under the typical anti-cruelty statute "simply does not count in legal terms."[156]

As has been argued, acts that are considered lawful pursuant to one of these exemptions remain harmful even though they are justified. It is thus unfounded to conclude that the harm inflicted on animals pursuant to justifiable activities does not "count" as legally relevant harm. The presence of justificatory circumstances (such as the advancement of agricultural or scientific activities) *does not* wipe away the harm caused by the conduct. What these exemptions actually reveal is that there are countervailing reasons that society considers to be of sufficient weight to justify engaging in prima facie wrongful conduct that causes harm to animals, not that the offense was not designed to protect animals in the first place. Therefore, the thesis advanced in this article—that the chief reason why society creates anti-cruelty offenses is to protect animals from the infliction of harm—is not incompatible with the exemptions contemplated in the typical animal cruelty statute.

E. Why All of This Should Matter to an Animal Rights Activist

Up to this point, this article has demonstrated that many animal law scholars' interpretations of the exemptions in anti-cruelty statutes are misguided because their interpretations conflate the inculpatory and exculpatory dimensions of such laws.

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[156] Bryant, *supra* note 118.

Now, this section will briefly sketch why such an interpretation is also objectionable on pragmatic grounds.

The reading of anti-cruelty statutes criticized here is probably the product of the fundamental disagreement that many animal law scholars have with the myriad of reasons that such laws provide as justifications for committing the offense. For them, the fact that the exemptions throughout these statutes leave an inordinate number of acts that are harmful to animals unpunished demonstrates that the real purpose of these laws is to protect human activities that cannot be accomplished without injuring animals.[157]

Although I am also outraged by many of the justifications these statutes provide for inflicting harm to animals, I believe that those who defend the position that I have attempted to debunk here have failed to understand what seems intuitively obvious to most people—that society has called for the creation of anti-cruelty offenses as a way of protecting animals, not as a vehicle for perpetuating the exploitation of them.[158] In my opinion, it is a strategic blunder to ignore that, as Jerrold Tannenbaum has correctly pointed out, people "virtually universally" accept the proposition that "the primary purpose of [anti-cruelty] laws is to protect animals."[159] Thus, instead of decrying statutes that criminalize animal abuse as another example of how animals are treated as "fungible" and "disposable" goods,[160] we should argue against the existence of the many exemptions that plague such laws by tapping into the basic sentiment that has led people to call for the enactment of anti-cruelty statutes in the first place.

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[157] *See id.*

[158] Robert Garner, *Animal Welfare: A Political Defense*, 1 J. ANIMAL L. & ETHICS 161, 171-72 (2006).

[159] Jerrold Tannenbaum, *Animals and the Law: Property, Cruelty, Rights*, 62 SOC. RES. 539, 580 (1995).

[160] Bryant, *supra* note 118, at 76.

CONCLUSIONS

A. Statutes Criminalizing Harmful Conduct Against Animals Do Not Primarily Seek to Protect Property Interests

The conclusion that anti-cruelty statutes do not primarily seek to further property interests will strike some as provocative. Many, if not most, animal law scholars have accepted Professor Francione's contention that "as far as the law is concerned, . . . animals are nothing more than commodities."[161] Thus, the proposition that animals are, for all relevant legal purposes, treated as property is generally accepted.

While this might very well be the case in the non-criminal context, it does not ring true as far as the penal law is concerned. Although a property-based conception of anti-cruelty statutes prevailed during much of the nineteenth century, since then, there has been a steady trend toward criminalizing animal abuse, regardless of questions of property. Under modern animal cruelty statutes, pet owners are generally not free to harm their animals. Furthermore, pet owners typically cannot consent to letting their animals be harmed by someone else. These propositions are at odds with a property-based conception of such laws.

Some believe the only way to give animals the protection they deserve lies in changing their legal status from property to persons. In an attempt to convince people that this shift in the juridical status of animals is necessary, scholars have traditionally appealed to extra-legal philosophical arguments. While these theoretical avenues are certainly worth pursuing, the seeds of the "personhood" of animals can already be found in modern animal cruelty laws. As far as anti-cruelty statutes are concerned, animals are being treated like persons in a very important way—they qualify as victims worthy of being protected by the criminal laws *irrespective of their property status in the*

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[161] Francione, *supra* note 72, at 9.

non-criminal law context.

B. Harm to Animals is Not Criminalized Primarily as a Means of Enforcing Morality

A second conclusion that can be drawn from the foregoing discussion is that, although mistreating animals is certainly immoral, it should not be contended that this is the principal reason for criminalizing the conduct. If there is one thing that the venerable harm principle stands for, it is the fact that an act should not be proscribed solely because it is deemed to be contrary to a moral principle. This contention is both compatible with the Supreme Court's decision in *Lawrence*[162] and with the position held by most criminal law theorists.

C. Criminal Statutes that Prohibit Harm to Animals Primarily Seek to Protect Animals from Being Harmed

The view that animal cruelty statutes seek to prevent harm to animals is both normatively appealing and descriptively illuminating. From a normative viewpoint, conferring legal protection to non-human sentient beings is a welcome development. If we can all agree that experiencing pain is something worth avoiding and that non-human animals have the capacity to be cognizant of such feelings, it follows that we should also protect them from the unjustifiable infliction of suffering.

From a descriptive standpoint it is also preferable to conceive anti-cruelty statutes as laws that are designed to prevent harm to animals. Both domestically and internationally, governments are banning activities that cause harm to animals despite the fact that these activities sometimes command considerable support from the populace. Thus, all state jurisdictions in the United States have criminalized dog and cock fighting over the objections of many.[163] Similarly, bullfighting is banned

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[162] *See supra* note 43 and accompanying text.

[163] Ed Anderson, *Louisiana's ban on cockfighting takes effect Friday; But adherents say practice won't die*, Times Picayune, Aug. 13, 2008, at Nat'l 1.

in several countries once associated with the Spanish crown, despite its rich historical roots.[164] These recent trends in anti-cruelty legislation are difficult to explain unless one believes the chief purpose of criminalizing animal abuse is to prevent the unjustifiable suffering of animals. No alternative conception of animal cruelty laws comes close to explaining this trend in anti-cruelty legislation.

This does not necessarily mean, however, that anti-cruelty statutes were enacted *solely* for the purpose of protecting animals from harm. Undoubtedly, these laws, like many other criminal statutes (i.e. rape and murder statutes), also exist in partial recognition of the fact that most people consider that engaging in the prohibited conduct is morally reprehensible. Furthermore, it is likely that the decision to criminalize cruelty to animals was motivated to some extent by an interest in preventing emotional pain to those with close ties to the creatures harmed or curbing future harm to humans.[165] It might also be argued that some features of animal cruelty laws promote the preservation of certain property interests.

Nevertheless, I believe that the conclusion that the primary purpose of animal cruelty statutes is to protect animals from harm is inescapable. This conclusion is not contradicted by the fact that these laws contain exemptions that allow for the causation of harm to animals pursuant to certain lawful activities (scientific experimentation, agriculture, hunting, etc.). An examination of the structure of anti-cruelty statutes reveals the exempted activities promote interests that justify inflicting suffering on animals, not that laws criminalizing animal abuse were not designed to protect the creatures in the first place.

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[164] In Latin America, bullfighting has been banned in Uruguay, Argentina, Chile and Cuba. People for the Ethical Treatment of Animals, Legislation Prohibiting or Restricting Animal Acts (2005), http://www.wildlifepimps.com/AnimalActsLeg.pdf (last visited Oct. 31, 2008).

[165] *See supra* Parts III.B-C.

D. People v. García: A Second Look

Once it is understood that the principal purpose of anti-cruelty statutes is to prevent injury to animals, one can see why the decision in *People v. García*[166] cannot withstand close scrutiny. The court in *García* asked all of the wrong questions because it seemed to conceive animal cruelty statutes as laws that are designed either to prevent future harm to humans or to prevent emotional harm to those with close ties to the animal abused. The former conceptualization of animal cruelty statutes led the court to focus on the state of mind of the perpetrator in order to determine whether his act evinced a heightened level of cruelty.[167] The latter characterization led the court to focus on the emotional harm caused to the custodian of the pet.[168]

By misapprehending the nature and purpose of anti-cruelty statutes, the court gave short shrift to the only being whose interests were sought to be protected by such legislation—the animal harmed—in this case, Junior the goldfish. Therefore, the question that should have been asked in *García* is whether the instantaneous killing of a goldfish by stomping on it constitutes an act of simple or aggravated cruelty. The decisive consideration should thus be the amount of pain and suffering endured by the fish. As the amount of pain inflicted increases, the arguments in favor of considering the act to be one of aggravated cruelty get stronger. Conversely, as the amount of pain and suffering decreases, the case in favor of finding aggravated cruelty weakens.

Reasonable minds might disagree with regard to whether the suffering endured by Junior was of such a degree to warrant a determination of aggravated cruelty. On one hand, the defendant's contention that the fish did not suffer because it was killed instantly seems to point in the direction of not considering this act to be one of aggravated cruelty. On the other hand, it

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[166] *See supra* note 26.

[167] People v. García, 777 N.Y.S.2d 846, 852 (Sup. Ct. 2004).

[168] *Id.*

might be argued the killing of a being constitutes the supreme act of cruelty. If this view prevailed, a finding of aggravated cruelty would be warranted.

Regardless of whether one believes the defendant should have prevailed in his arguments, there is little doubt with regard to who was the real victim of the court's analysis in *García* —a little goldfish named Junior.

NOT FOR LOVE OR MONEY: APPOINTING A PUBLIC DEFENDER TO LITIGATE A CLAIM OF INEFFECTIVE ASSISTANCE INVOLVING ANOTHER PUBLIC DEFENDER

*Christopher M. Johnson**

In June 2003, a New Hampshire grand jury indicted Scott Veale for one count of timber trespass and one count of theft by unauthorized taking.[1] At the request of his public defender, the court ordered a competency evaluation of Veale.[2] As a result of that evaluation, the court found Veale not competent to stand trial, and not restorable to competence.[3] As required by New Hampshire law, the trial court granted the public defender's motion to dismiss the prosecution against Veale.[4]

Acting *pro se*, Veale then filed a notice of appeal alleging, among other claims, that his public defender had rendered

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[1] State v. Veale, 919 A.2d 794, 795-96 (N.H. 2007); N.H. REV. STAT. ANN. § 227-J (2000 & Supp. 2003) (timber trespass); N.H. REV. STAT. ANN. § 637:3 (1996) (theft by unauthorized taking).

[2] *Veale*, 919 A.2d at 795.

[3] *Id.*

[4] *Id.*; N.H. REV. STAT. ANN. § 135:17-a (2005 & Supp. 2007) (requiring dismissal of prosecution against persons found incompetent and not restorable to competence within one year).

ineffective assistance of counsel.[5] The state supreme court appointed the New Hampshire Appellate Defender to represent Veale on that appeal.[6] Upon receiving the notice of appeal and the appointment order, the Appellate Defender moved to withdraw from the representation, citing a conflict of interest.[7]

The conflict arose out of the connection between the Appellate Defender Program and the New Hampshire Public Defender. New Hampshire operates a state-wide public defender program.[8] The program has nine trial offices throughout the state, each covering district and superior courts within a geographically-defined area. The program also includes an office specializing in the defense of persons facing post-sentence confinement as dangerous sexual offenders. Finally, it includes the Appellate Defender office, which represents indigent criminal defendants in the state supreme court.[9]

The Appellate Defender constitutes a joint enterprise between the New Hampshire Public Defender and the Franklin Pierce Law Center, New Hampshire's only law school.[10] The assistant appellate defenders are salaried employees of the public defender, and they serve as assistant appellate defenders on two-year rotations before returning to a public defender trial office. During their rotations, assistant appellate defenders often actively represent clients at the trial level and retain administrative duties within the public defender's office. Public defenders and appellate defenders work closely together and share confidential information. Attorneys in the two offices are often trained and educated together using materials and services available only to employees of the public defender and

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[5] *Veale*, 919 A.2d at 796.

[6] *Id.*

[7] *Id.*

[8] N.H. REV. STAT. ANN. § 604-B (2001). For further discussion of the New Hampshire Appellate Defender Program, see Christopher M. Johnson, *The New Hampshire Appellate Defender Program: An Apprenticeship Clinic*, 75 MISS. L.J. 825 (2006).

[9] N.H. REV. STAT. ANN. § 604-B:4 (2001) (authorizing the public defender to subcontract for attorney services, including appellate services).

[10] Johnson, *supra* note 8, at 825-26.

lawyers who contract with the state to provide indigent representation.[11]

In response to the motion to withdraw from the representation of Veale, the New Hampshire Supreme Court issued an order directing the Appellate Defender to address "whether the mere allegation of ineffectiveness of public defender trial counsel by a defendant requires the withdrawal of the appellate defender."[12] Upon reading that order, I thought I knew the answer: no public defender can litigate a claim of ineffective assistance involving another public defender employed by the same entity, at least where the claim relates to the lawyer's performance. Upon researching the question, however, I discovered a split of authority on the matter. The question involved subtleties I had not previously appreciated.

The question of whether courts can appoint one public defender to litigate a claim of ineffective assistance of counsel involving an affiliated public defender has received very little scholarly attention.[13] A number of jurisdictions allow courts, under some circumstances, to appoint public defenders to litigate claims of ineffective assistance directed against an affiliated public defender. In those jurisdictions, courts undertake a case-by-case analysis to decide whether the affiliation creates a disqualifying conflict. In preferring a case-by-case analysis to a *per se* rule barring the appointment of an affiliated public defender in any such case, courts offer various justifications.[14]

First, public defenders, unlike lawyers in private practice, have no financial interest in the results of their cases, nor in the reputations of their public defender colleagues. Second, public defenders have a distinguishing characteristic—a zealous dedication to their clients—that alleviates the concern that

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[11] *Veale*, 919 A.2d at 796-97; Johnson, *supra* note 8, at 825-27.

[12] A copy of the order is on file with the author.

[13] I have found only one law review article that gives any sustained attention to the issue: David N. Webster, *The Public Defender, the Sixth Amendment, and the Code of Professional Responsibility: The Resolution of a Conflict of Interest*, 12 AM. CRIM. L. REV. 739 (1974).

[14] *See infra* Part IIA.

conflicting collegial or institutional loyalties might inhibit their advocacy. Third, practical considerations justify the appointment of public defenders in such cases. The appointment of a public defender costs less than the appointment of private counsel, and public defenders specialize in criminal practice, and so may bring greater expertise to the case than would a general practitioner.

Other jurisdictions apply a *per se* rule barring the appointment of a public defender to litigate an ineffectiveness claim involving an affiliated public defender. In preferring that rule, courts attribute significant influence on behavior to collegial or institutional loyalty. Some judges also have criticized the case-by-case approach as unworkable. [15]

This article analyzes those two approaches to the issue. In Part I, the article describes the legal doctrines bearing on the question. Those doctrines, as presently articulated, do not compel any particular resolution of the dispute, but can accommodate either approach. In Part II, the article details the reasoning of the courts as they defend the adoption of one or the other of the two possible rules.

In Part III, the article weighs the advantages and disadvantages of the two approaches, concluding that the *per se* rule best reconciles the considerations and interests at stake. The conclusion does not rely on generalizations about an essential public defender character. Assertions about the "typical public defender" or about an essential public defender character seem implausible, given the vast number of public defenders and the variety of public defender institutional structures. Moreover, such generalizations, because not susceptible to demonstration, will persuade only those already convinced. The article therefore relies, in preferring the *per se* rule, on concerns about the administrability of the case-by-case approach.

I. THE RELEVANT LEGAL RULES

The issue implicates two different sources of law, and two

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[15] *See infra* Part II.

different sets of rules. A claim of ineffective assistance of counsel arises under the Sixth Amendment's right to counsel. The question of whether a particular lawyer may represent a particular client implicates the professional conduct rules defining conflicts of interest. This article briefly describes each set of rules below.

A. Ineffective Assistance of Counsel

The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."[16] The Supreme Court has long recognized that the right to counsel encompasses the right to the effective assistance of counsel.[17] Claims of ineffective assistance of counsel can differ in their essentials, and some claims do not involve criticism of the performance of defense counsel.

For example, some claims of ineffective assistance of counsel focus upon obstacles to an effective defense created by the trial court[18] or by state law.[19] Other claims focus on defense counsel, but do not necessarily require a critique of counsel's performance. Such claims may focus instead on circumstances that "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."[20] As an illustration of such circumstances, the Supreme Court has referred to the facts of the infamous Scottsboro Boys case, in which the trial court appointed "all the members of the bar" in Scottsboro for the purpose of advising the defendants.[21] Another circumstantial claim of ineffective assistance that focuses on

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[16] U.S. CONST. amend. VI.

[17] McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

[18] *See, e.g.*, Geders v. United States, 425 U.S. 80 (1976) (finding violation of right to counsel in trial court's order barring counsel from consulting with defendant during overnight recess in trial); Herring v. New York, 422 U.S. 853 (1975) (finding violation of right to counsel in trial court's ruling barring counsel from giving closing argument).

[19] *See, e.g.*, Brooks v. Tennessee, 406 U.S. 605 (1972) (invalidating state statute restricting defense's decision about when defendant shall testify during defense's case); Ferguson v. Georgia, 365 U.S. 570 (1961) (invalidating state statute barring defendant from testifying).

[20] United States v. Cronic, 466 U.S. 648, 658 (1984).

[21] *Id.* at 660 (discussing Powell v. Alabama, 287 U.S. 45 (1932)).

defense counsel without focusing on counsel's competence may arise when defense counsel represents clients with adverse interests.[22]

This article does not address the question of a conflict of interest arising out of those circumstances. Instead, it focuses on the much more common, and much more difficult, question of whether a public defender may litigate a claim of ineffective assistance of counsel involving a fellow public defender when that fellow defender's performance and competence are at issue. The Supreme Court's decision in *Strickland v. Washington*[23] sets out the elements of such claims.

In that much-cited case,[24] the Supreme Court articulated two elements that comprise a performance-based claim of ineffective assistance. First, a defendant must show that counsel's performance was deficient. Second, the defendant must show that counsel's deficient performance prejudiced the defense.[25] The deficient performance prong raises an issue for this article.

To satisfy that prong, a defendant must show "that counsel's representation fell below an objective standard of reasonableness."[26] In defining objective reasonableness, the Court referred to "prevailing professional norms."[27] In explaining the meaning of the prong, the Court took pains to emphasize that "[j]udicial scrutiny of counsel's performance must be highly deferential,"[28] and that courts must "indulge a strong presumption that counsel's conduct falls within the wide

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[22] Mickens v. Taylor, 535 U.S. 162 (2002); Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway v. Arkansas, 435 U.S. 475 (1978).

[23] 466 U.S. 668 (1984).

[24] Adam M. Steinman, *The Irrepressible Myth of* Celotex*: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 144 (2006) (including a chart listing most-frequently cited cases; identifying *Strickland* as the third-most cited case by all courts (and the most cited criminal case) and as the most-cited case, bar none, by state courts).

[25] *Strickland*, 466 U.S. at 687.

[26] *Id.* at 688.

[27] *Id.* at 688.

[28] *Id.* at 689.

range of reasonable professional assistance."[29] The effect of that interpretation of the standard has been, as commentators have noted, to accept as reasonable a very wide range of actions and choices.[30] To win a claim of ineffective assistance, thus, a defendant must show that counsel's performance was very poor indeed.

B. The Ethical Rules Governing Conflicts of Interest

Many jurisdictions have adopted the American Bar Association's Model Rules of Professional Conduct conflict-of-interest rules.[31] This article therefore uses the relevant provisions of the Model Rules to explore the problem raised by claims of ineffective assistance involving affiliated public defenders. Similar conflicts of interest rules exist in jurisdictions drawing upon other models, such as the ABA's Model Code of Professional Responsibility.[32]

One can describe the potential conflict arising out of the ineffectiveness claim in at least two ways. One account identifies the primary conflict as involving the allegedly ineffective lawyer. The conflict thus arises out of the fact that lawyers have a conflict precluding them from alleging themselves ineffective. Insofar as that conflict extends to other,

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[29] *Id.*

[30] *See, e.g.*, Martin C. Calhoun, *How to Thread the Needle: Toward A Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 413-14 (1988) (noting that "[T]he Supreme Court's two-prong test for 'actual ineffective assistance of counsel' claims has been compared to the proverbial 'eye of the needle' through which few petitioners will be able to pass"); Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 18 (2002) (describing the *Strickland* guarantee of a right to effective assistance as not having "much substance to it at all"); Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1434 (1999) (citing commentators critical of *Strickland*).

[31] MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 5 (Lexis Nexis 3d ed. 2004) (noting that "[a]lmost all jurisdictions have adopted the Model Rules, California and New York being the major exceptions").

[32] MODEL CODE OF PROF'L RESPONSIBILITY DR 5-101(A), EC 5-2, EC 5-21 (1980). Rules based on the Model Code remain in effect in a few states, including New York. FREEDMAN & SMITH, *supra* note 31, at 4-5. California's scheme parallels Rule 1.7 of the Model Rules. *See* CAL. RULES OF PROF'L CONDUCT R. 3-310.

affiliated public defenders, it does so by the imputation rules.

The second account of the conflict avoids recourse to the imputation rules. Instead, it describes the lawyer appointed to litigate a colleague's ineffectiveness as having a direct interest in that colleague's reputation, and in the reputation of the organization to which both belong. This article next sets forth the ethical rules bearing on each of those descriptions of the conflict.

1. Analysis of the First Account of the Conflict

Rule 1.7(a) bars lawyers in general from representing a client where the lawyer has a concurrent conflict of interest. Rule 1.7(a) declares that such a conflict of interest exists, *inter alia*, where "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."[33] That provision raises the question of whether an individual public defender's affiliation with the public defender entity or relationship with an allegedly ineffective public defender colleague implicates a "responsibility to a third person" or a "personal interest of the lawyer."[34]

Notwithstanding the existence of a conflict, Rule 1.7(b) allows the representation if

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.[35]

That rule declares a three-step process for the evaluation of possible conflicts.

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[33] MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2007).

[34] *See id.*

[35] *Id.* R. 1.7(b)(1)-(4).

First, the lawyer weighs the circumstances to determine whether the lawyer believes that the conflict will adversely affect the representation. If the lawyer concludes that the conflict would adversely affect the representation, the lawyer should not undertake the representation or, if already appointed, should seek to withdraw. If the lawyer concludes that the conflict will not adversely affect the representation, the analysis proceeds to the second step, which focuses on the objective reasonableness of the lawyer's conclusion that the conflict will not adversely affect the representation. If the representation survives that reasonableness analysis, the matter reaches the third step: client consent.

Courts have had no trouble in recognizing that lawyers have an interest in not being found ineffective, at least where the claim raises a question of competence.[36] To raise such a claim would pit the lawyer's duty of loyalty to the client against the lawyer's own interest in maintaining a reputation for competence and, more fundamentally, the lawyer's interest in maintaining a license to practice. A lawyer who renders ineffective assistance may thereby violate the rule of professional conduct mandating competence[37] and face professional disciplinary sanctions. Courts consistently hold that no lawyer may litigate such a claim when the claim raises a question about the lawyer's own competence.[38] Such a representation cannot survive the objective reasonableness step of the conflict analysis.

The next inquiry is whether that conflict disqualifies other public defenders associated with the allegedly ineffective lawyer. The conflict rules do extend the scope of some disqualifications beyond the lawyer directly involved to other lawyers with whom

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[36] *E.g.*, Murphy v. People, 863 P.2d 301, 304-05 (Colo. 1993); Shelton v. United States, 323 A.2d 717, 718 (D.C. 1974); Commonwealth v. Fox, 383 A.2d 199, 200 (Pa. 1978).

[37] MODEL RULES OF PROF'L CONDUCT R. 1.1 (2007).

[38] *See supra* note 36; *see also* White v. Kelso, 401 S.E.2d 733, 734 (Ga. 1991) ("an attorney cannot reasonably be expected to assert or argue his or her own ineffectiveness").

that lawyer is associated.[39] When the two lawyers are colleagues affiliated with a single firm, or in a public defender office, each may have an interest in the success and reputation of the other. Recognizing that possibility, the Rules enforce a principle of imputed disqualification.

Rule 1.10 provides that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7 . . . ."[40] As does Rule 1.7, Rule 1.10 allows an exception to the general rule of disqualification. Paragraph (c) provides that a "disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7."[41]

Insofar as Rule 1.10 proposes to apply only to "lawyers . . . associated in a firm,"[42] the question arises as to whether a public defender office constitutes a "firm" within the meaning of the rule. The comments to Rule 1.10 address that question, declaring that "the term 'firm' denotes . . . lawyers employed in a legal services organization."[43] A number of courts, however, have found otherwise, and excluded public defenders from the definition of "firm," and therefore from the application of the imputed disqualification rule.[44] Other courts have found that public defender organizations are "firms," and covered by the imputed disqualification rule.[45] The outcome of the analysis, on the first account of the conflict, depends on whether the organization for which the allegedly-ineffective public defender and the appointed public defender both work constitutes a "firm" within the meaning of the rules.

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[39] MODEL RULES OF PROF'L CONDUCT R. 1.10 (2007).

[40] *Id.* R. 1.10(a) (2007).

[41] *Id.* R. 1.10(c) (2007).

[42] *Id.* R. 1.10(a) (2007).

[43] *Id.* R. 1.10 cmt. 1 (2007).

[44] *See, e.g.*, State v. Lentz, 639 N.E.2d 784 (Ohio 1994); People v. Banks, 520 N.E.2d 617, 619 (Ill. 1987).

[45] *See, e.g.*, *Veale*, 919 A.2d at 796; Ryan v. Thomas, 409 S.E.2d 507, 509 (Ga. 1991).

2. Analysis of the Second Account of the Conflict

As noted above, the second description of the conflict avoids recourse to the imputation rule by focusing in the first instance on the appointed lawyer's situation, rather than on the allegedly-ineffective lawyer's situation. On that account, the possible conflict arises out of the appointed lawyer's own interest in the reputation of the allegedly-ineffective lawyer and of the public defender organization for which they both work.

The first step in the Rule 1.7(b) analysis focuses on the lawyer's own belief as to whether the conflict may adversely affect the representation. The second step addresses that issue from an objective point of view. Insofar as the source of the possible conflict arises out of the affiliation of the appointed lawyer and the allegedly-ineffective lawyer together in a single public defender organization, the reasonableness analysis will turn on the nature and strength of the influence of that affiliation over the lawyer's behavior. Although it takes a different route, the second description of the conflict thus arrives at essentially the same destination as the first. Both turn on the nature of the public defender entity.

C. Conclusion

The doctrine thus leads courts to inquire into, and characterize, the nature of public defender organizations. Are they firms? Or are they, in some essential respect, so different from private law firms as to justify removing public defender entities from the scope of the conflict rules in general, and from the imputed disqualification rule in particular? Because the professional conduct rules raise, without answering, those questions, courts have had to supply answers from other sources. This article accordingly turns next to examine in detail the reasoning given by courts that have confronted those questions.

II. THE CASELAW: *PER SE* RULE OR CASE-BY-CASE ANALYSIS?

Courts confronting the question of whether one public defender may litigate an ineffectiveness claim involving an

associated public defender take one of two general approaches. Some courts have held that the rules of professional conduct establish a *per se* bar against the public defender's representation in such circumstances.[46] In effect, that approach declares unreasonable the belief that the shared public defender affiliation will not adversely affect the representation.

Other courts, applying a case-by-case analysis, have concluded that the law permits public defender representation in such cases, at least under some circumstances.[47] The case-by-case approach seems more difficult to reconcile with the controlling ethical rules, at least when applied to deny an appointed public defender's request to withdraw. It would seem that, in making such a motion, the appointed public defender declares a belief that the conflict would adversely affect the representation. Under Rule 1.7, as noted above, such a belief should generally preclude representation. The case-by-case approach, however, apparently avoids confronting the lawyer's subjective belief by treating the issue wholly as a matter for objective assessment. That is, the case-by-case approach posits that it will sometimes be reasonable to believe that the shared affiliation would not adversely affect the representation.

A. The Case-By-Case Analysis

The United States Court of Appeals for the Tenth Circuit and state courts in Illinois, New Mexico, Ohio, and Rhode Island have all adopted a case-by-case analysis.[48] In theory, given the continuing existence of the imputed disqualification rule in

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[46] *See infra* Part IIB.

[47] *See infra* Part IIA.

[48] *See* Cannon v. Mullin, 383 F.3d 1152 (10th Cir. 2004); People v. Banks, 520 N.E.2d 617 (Ill. 1987); Morales v. Bridgforth, 100 P.3d 668 (N.M. 2004); State v. Lentz, 639 N.E.2d 784 (Ohio 1994); Simpson v. State, 769 A.2d 1257 (R.I. 2001). It bears mentioning that the Rhode Island decision differs from all the others, in that it involved a claim of violation of the constitutional right to counsel, when a court appointed one public defender after another had, according to the defendant, rendered ineffective assistance during pre-trial proceedings. *Simpson*, 769 A.2d at 1266-71. The court held that the Constitution required a case-by-case approach, rather than *per se* reversal. *Id.* at 1270. The case did not, therefore, decide what rule a court should apply when a court decides whether to appoint one public defender to litigate the effectiveness of another.

general, courts could adopt one of two lines of reasoning to support the conclusion that the ethics rules do not necessarily bar such representation. First, courts could find some distinctive feature in the ineffectiveness claim, such as to define that claim as not creating a conflict, or at least, not creating a conflict subject to the imputation rule. Second, courts could find the distinctive feature not in the nature of the ineffectiveness claim, but in the nature of public-defender practice.

Among the case-by-case courts, only the Tenth Circuit has even arguably pursued the first line of reasoning, which would permit lawyers in private practice, as well as public defenders, to sometimes litigate a claim of ineffective assistance though the claim involved a colleague. In adopting a case-by-case analysis, the Tenth Circuit identified no considerations unique to public defenders.[49] Rather, after acknowledging that an ineffectiveness claim involves the "bold" assertion that a colleague's "performance was not only inferior, but unreasonable," the Tenth Circuit focused on the institutional structure of the particular public defender office:

> A statewide public defender's office with independent local offices, and perhaps even a distinct appellate office, would not raise the same concerns as when trial and appellate counsel work in adjacent rooms. The culture of an office can also make a substantial difference. A history of raising ineffective-assistance claims could allay concerns.[50]

That line of reasoning could apply as readily to attorneys associated in a private firm divided into branch offices as to public defenders.

All of the state courts have taken the second course, finding an escape from the imputation rule not in the nature of the ineffectiveness claim, but in the nature of public defenders as such.[51] Citing differences between public defenders and private practitioners, those courts prefer to inquire into the

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[49] *Cannon*, 383 F.3d at 1173-74.

[50] *Id.*

[51] *E.g.*, *Banks*, 520 N.E.2d at 619; *Morales*, 100 P.3d at 669-70; *Lentz*, 639 N.E.2d at 786.

disqualification issue case-by-case, rather than enforcing a presumption that collegial relationships would inhibit advocacy.[52] They offer one or more of three reasons to justify that different treatment of public defenders.

First, some courts find significance in the fact that public defenders, unlike private practitioners, have no financial interest in the outcome of any case nor in the professional reputation of any public defender colleague.[53] "[U]nlike the public defender, the private attorney is in competition with other law firms for clients' business, so diminished reputation more directly affects the finances of private sector attorneys."[54] A necessary premise of the argument that financial conflicts justify a *per se* rule while "conflicts driven by loyalty, reputation and *esprit de corps*" do not, is that influences of the latter sort simply do not affect lawyers so strongly as do conflicts rooted in financial interests.[55]

Second, some courts conclude that a public defender ethos precludes public defenders from feeling such concern for the professional reputation of colleagues as might prevent them from litigating zealously an ineffectiveness claim involving a colleague.[56] Public defenders, on this account, possess "inbred adversary tendencies" which make them zealous in the defense of their clients, and heedless of any professional loyalty owed to other persons.[57] Thus, "a public defender does not necessarily owe an allegiance to the reputation of his office such as to interfere with his undivided loyalty towards his client."[58]

The courts offer little by way of justification for the premise that office loyalty does not exist, or if it exists, does not much influence individual public defenders. At most, courts tend to

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[52] The Illinois Supreme Court, for example, concluded that "any such loyalty to one's office was too remote to justify a *per se* conflict of interest rule." *Banks*, 520 N.E.2d at 619.

[53] *E.g.*, *Lentz*, 639 N.E.2d at 786.

[54] *Id.*

[55] *Id.*

[56] *See, e.g.*, *Banks*, 520 N.E.2d at 619-20.

[57] *Id.* at 621 (quoting ABA Standards, The Defense Function, Commentary, at 212-13 (1970)).

[58] *Id.* at 620.

praise the dedication of public defenders and implicitly minimize the strength of the ties of loyalty to the institution. Thus, some judges prefer to emphasize "the extent of the professional and personal commitment made by these outstanding public servants in their quest to provide indigent defendants with the most effective representation possible."[59] Finally, some suggest that no conflict at all exists between loyalty to office and loyalty to client: "[t]o the contrary, it can equally be argued that a positive image [of the office] is fostered where an office aggressively pursues allegations made against some of its members."[60]

Third, some courts refer to practical considerations supporting the appointment of public defenders to litigate ineffective assistance claims. Some argue that a policy allowing the appointment of private practitioners would encourage prisoners represented at trial by public defenders to bring frivolous claims of ineffective assistance, simply in order to obtain representation by a non-public defender.[61] That argument presumes the greater desirability, at least as judged by indigent defendants, of private counsel. A second argument arising from the opposite presumption proposes that public defenders better represent indigent defendants than do the likely substitute attorneys. Thus, it would be wrong to apply the conflict rules in such a way as to provide defendants a less qualified lawyer than the disqualified lawyer.[62]

B. The Per Se Rule

Courts in Arkansas, Colorado, the District of Columbia, Florida, Georgia, New Hampshire, New Jersey, and Pennsylvania have adopted a *per se* rule barring public defenders from litigating the ineffectiveness of affiliated public defenders.[63] Insofar as applying a *per se* rule to public defenders

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[59] *Id.* at 623 (Clark, C.J., specially concurring).

[60] *Id.* at 620 (majority opinion).

[61] *Id.* at 622 (Clark, C.J., specially concurring).

[62] *E.g.*, *Morales*, 100 P.3d at 670.

[63] Hill v. State, 566 S.W.2d 127 (Ark. 1978); McCall v. District Court, 783 P.2d 1223 (Colo. 1989); Angarano v. United States, 329 A.2d 453 (D.C. 1974); Adams v. State, 380

treats public defenders the same as private-firm lawyers, many judges do not seem to see the need to justify the application of the *per se* rule.[64] Those who do discuss the matter defend the *per se* rule by replying to the public-defender exceptionalism advocated by the case-by-case courts.

Summarizing the case against public defender exceptionalism, one judge wrote:

> We are reluctant ever to make an exception from the professional norm for attorneys employed by the government or others who provide legal representation without compensation from the client because then we might encourage a misapprehension that the special nature of such representation justifies departure from the profession's standards. We should avoid always any action that would give the appearance that government attorneys are "legal Hessians" hired "to do a job" rather than attorneys at law.[65]

In response to the lack-of-a-financial-incentive argument, some judges contend that public defenders do, in fact, have a financial interest in each other's reputation and in that of their office generally. Thus, "by denigrating the abilities of assistant public defenders, they prejudice[] their own prospects for employment after leaving the public defender's office."[66]

Some courts also note that "financial interests are not the

So. 2d 421 (Fla. 1980) (appointing public defender from different judicial circuit to litigate ineffectiveness of trial public defender); Ryan v. Thomas, 409 S.E.2d 507, 509 (Ga. 1991) (noting that Georgia courts restrict the *per se* disqualification to instances in which both the appointed lawyer and the allegedly ineffective lawyer remain public defenders at the time of the litigation of the ineffectiveness claim); *but see* Chatman v. Mancill, 626 S.E.2d 102, 106 (Ga. 2006) (general rule barring appellate public defender from litigating ineffectiveness claim involving trial public defender ceases to apply when trial public defender no longer works at public defender office); State v. Veale, 919 A.2d 794 (N.H. 2007); State v. Bell, 447 A.2d 525 (N.J. 1982); Commonwealth v. Moore, 805 A.2d 1212, 1215 (Pa. 2002) (general rule barring public defenders from litigating such claims does not apply where trial lawyer, a part-time public defender, was privately retained by defendant).

[64] *E.g.*, *Hill*, 566 S.W.2d at 127; *Angarano*, 329 A.2d at 457-58; *Bell*, 447 A.2d at 528 n.2; *Ryan*, 409 S.E.2d at 508-09.

[65] *Angarano*, 329 A.2d at 465 (Gallagher, J., dissenting) (quoting Borden v. Borden, 277 A.2d 89, 92-93 (D.C. App. 1971)).

[66] *Banks*, 520 N.E.2d at 625 (Simon, J., dissenting).

only interests that could influence an attorney, and, arguably, are not the most powerful influences."[67] Pursuing that insight, some courts emphasize the existence of "powerful individual loyalties to one's colleagues."[68] Lawyers having ties of loyalty to each other can face "hostility from their peers and supervisors," as a consequence of litigating an ineffectiveness claim.[69]

Loyalty runs not only to individual colleagues, but to the public defender institution itself. "Every attorney, like every worker in the marketplace, associates his or her sense of worth in his or her job with the reputation of his or her organization."[70] Public defenders have a "natural inclination" to protect the reputation of the organization "by defending against the charges of incompetency."[71] Lawyers who must allege a colleague ineffective have to "argue that their peers, and ultimately their supervisors and themselves, [are] second-rate lawyers in a second-rate office."[72] The result of such an event would be "personal discord as well as general office disruption."[73]

Judges supporting the *per se* rule also contest the claim that practical considerations compel adoption of a case-by-case approach. Courts could appoint fully qualified private counsel in appropriate cases or, in states that do not have only a statewide public defender, courts could appoint a public defender who has no organizational affiliation with the allegedly-ineffective public defender.[74] Moreover, the rarity of successful claims of ineffective assistance limits the incentive of prisoners to bring frivolous claims or at least limits the burdens faced by courts

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[67] *Veale*, 919 A.2d at 797.

[68] *Banks*, 520 N.E.2d at 625 (Simon, J., dissenting).

[69] *Id.*; *see also Angarano*, 329 A.2d at 467 (Gallagher, J., dissenting) (quoting brief of Public Defender Service).

[70] *Lentz*, 639 N.E.2d at 788 (Wright, J., dissenting).

[71] *Banks*, 520 N.E.2d at 623-24 (Simon, J., dissenting) (quoting People v. Smith, 230 N.E.2d 169, 170 (Ill. 1967)); *see also Adams*, 380 So. 2d at 422.

[72] *Banks*, 520 N.E.2d at 626 (Simon, J., dissenting).

[73] *Angarano*, 329 A.2d at 470 (Gallagher, J., dissenting).

[74] *Adams*, 380 So. 2d at 422-23 (appointing unaffiliated public defender); State v. Veale, 919 A.2d 794, 798 (N.H. 2007) (noting adequacy of representation afforded by substitute private counsel); *Lentz*, 639 N.E.2d at 789 (Wright, J., dissenting).

with respect to such claims.[75]

A related practical concern involves the discreditable appearance of the judicial system when one lawyer alleges a colleague ineffective. "Such an occurrence might well leave the trial judge with a suspicion of a collusive attempt to secure relief for a convicted client; *it might leave the client wondering whether, in fact, these office colleagues were conspiring against him* . . . ."[76]

Finally, advocates of the *per se* rule claim that courts can easily apply it, as it "eliminates the need to make case-by-case assessments of conflicting loyalties that may well be extremely subtle or subconscious."[77] By reason of the subtlety of those influences, courts may struggle to detect and measure their influence over a lawyer. The case-by-case rule affords judges very little guidance in how to detect and measure such loyalties.[78] Perhaps not coincidentally, the courts applying a case-by-case approach that actually reach a decision on the facts before them[79] tend to find no conflict barring representation by the public defender.[80] In no reported decision of which I am aware has a court, applying the case-by-case analysis to the problem, found the public defender barred from litigating the ineffectiveness claim. The case-by-case rule thus may tend to function in practice like the opposite *per se* rule, in declaring that collegial loyalty never provides grounds to disqualify one public defender from litigating an ineffectiveness claim against a colleague.[81]

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[75] *Angarano*, 329 A.2d at 469 (Gallagher, J., dissenting).

[76] *Id.* at 467 (quoting brief of the Public Defender Service).

[77] *Banks*, 520 N.E.2d at 625 (Simon, J., dissenting); *see also Lentz*, 639 N.E.2d at 787 (Wright, J., dissenting).

[78] *See Banks*, 520 N.E.2d at 625 (Simon, J., dissenting); *Lentz*, 639 N.E.2d at 787, 789 (Wright, J., dissenting); *Veale*, 919 A.2d at 799.

[79] This excludes Cannon v. Mullin, 383 F.3d 1152 (10th Cir. 2004), which resulted in a remand on the issue.

[80] In the following cases, courts applying the case-by-case approach found no bar to public defender representation. *Banks*, 520 N.E.2d at 621; People v. Munson, 638 N.E.2d 1207, 1211-12 (Ill. App. Ct. 1994). In none of the cases cited in this article did a court applying a case-by-case rule find a lawyer disqualified.

[81] *See, e.g.*, *Banks*, 520 N.E.2d at 625 (Simon, J., dissenting) ("The court's 'case-by-case inquiry,' it appears, is but window dressing for a new *per se* rule that loyalty to the

C. A Procedural Approach

Some courts try to avoid the issue by means of procedural devices that postpone the decision as to what counsel to appoint when a prisoner raises a claim of ineffective assistance.[82] The New Hampshire Supreme Court, for example, requires prisoners who would raise a claim of ineffective assistance during the pendency of their direct appeal to elect whether to hold that claim until after the conclusion of the direct appeal or litigate that claim immediately in the trial court and hold the direct appeal in abeyance. If the prisoner chooses the first course, the court will appoint the appellate public defender to handle an appeal which, by the prisoner's election, no longer involves a claim of ineffective assistance. If the prisoner chooses the second course, the court awaits the outcome of the lower court proceeding and will only appoint a non-public defender appellate counsel if the court accepts an appeal from that proceeding.

That procedure may well reduce the frequency of the need to appoint private counsel to handle an indigent appeal. It does not, though, altogether eliminate the possibility of appellate litigation of an ineffectiveness claim involving a public defender. Neither does the procedure compromise the court's conclusion that no public defender lawyer can litigate an ineffectiveness claim involving the performance of another public defender attorney. Thus, New Hampshire's third approach simply combines the *per se* rule with a procedure designed to minimize the frequency with which appointment issues arise.

III. An Analysis of the Premises

The debate between the *per se* rule and the case-by-case rule arises, thus, from a disagreement about basic premises. Adherents of the case-by-case approach presume that collegial or

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public defender's office or a lawyer's associates in it cannot form the basis of a conflict of interest").

[82] *See, e.g.*, People v. Mills, 163 P.3d 1129, 1133-35 (Colo. 2007) (establishing procedure limiting need to appoint private counsel to circumstances in which a colorable basis is shown in support of the claim of ineffective assistance); Angarano v. United States, 329 A.2d 453, 457-58 (D.C. 1974); *Veale*, 919 A.2d at 800.

institutional loyalty influences lawyers less than does a lawyer's own financial interest. Adherents of the *per se* approach suspect that personal or institutional loyalties exert as strong an influence as does financial gain. The case-by-case approach posits a typical public defender characterized by a single-minded devotion to client representation. The *per se* approach contemplates a typical public defender whose professional self-esteem depends, to a significant extent, on the quality and reputation of colleagues and of the public defender institution. The case-by-case approach finds social utility in preserving the option of appointing a public defender to litigate such claims. The *per se* approach finds no sufficient practical advantages to that option. This article next evaluates those disputes about premises.

A. For Love?: The Loyalty Interest

Nobody contends that considerations of collegial loyalty can never disqualify a public defender from litigating a claim alleging a colleague ineffective. Indeed, it would reveal a remarkable characteristic of public defenders if no public defender's advocacy of an ineffectiveness claim were ever inhibited by considerations of collegial loyalty. Rather, advocates of the case-by-case rule argue only that collegial loyalty does not always create a disqualifying conflict. Sometimes, at least for some public defenders, those considerations would not inhibit advocacy. The case-by-case approach claims the advantage of achieving the correct result in each case; courts can disqualify public defenders inhibited by collegial loyalty, while appointing public defenders not so inhibited.

Advocates of the *per se* rule could perhaps argue that considerations of collegial loyalty always operate upon lawyers, or at least upon public defenders, so as to create a disqualifying conflict of interest with respect to ineffective assistance claims. That assertion would, in its way, be just as extraordinary as the opposite claim that collegial loyalty never influences public defenders. However, advocates of the *per se* rule need not assert any such universally-shared, essential "public defender

character."

The best case for the *per se* rule instead advances a critique of the case-by-case rule. As we have seen, some judges have criticized the case-by-case rule for requiring courts to investigate the influence of collegial loyalty in particular cases without providing adequate guidance as to how to do so.[83] Controversy between advocates of case-by-case and *per se* rules is not unique to the specific context of this article. Courts and commentators in a variety of contexts have considered the advantages and disadvantages of case-by-case and *per se* rules.[84]

A complete analysis of the reasons cited by courts for choosing, in various contexts, between case-by-case and *per se* rules would require a separate article. Here, I identify several factors relevant to the choice between a case-by-case approach and a *per se* approach.

The relevant factors divide into two categories. First, policy considerations may bear upon the choice between a case-by-case rule and a *per se* rule. Courts wishing to create incentives for some person to behave in a certain way might, for that reason, prefer a *per se* rule that requires that person to act in that way. On the other hand, courts willing to tolerate a variety of approaches to a particular issue might, for that reason, prefer a case-by-case approach that leaves the issue susceptible to varying resolutions depending on the particulars of the situation.

Second, concerns about practical administrability may bear upon the choice between a case-by-case rule and a *per se* rule. Case-by-case rules require courts to discover and measure the relevant facts using the tools of judicial fact-finding. In settings

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[83] *See, e.g.*, *Banks*, 520 N.E.2d at 625 (Simon, J., dissenting); *Veale*, 919 A.2d at 799; *Lentz*, 639 N.E.2d at 787, 789 (Wright, J., dissenting).

[84] *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2712-13 (2007) (antitrust context); N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 219 (3d Cir. 2002) (media access to deportation hearings); Shotwell v. Donahoe, 85 P.3d 1045, 1048-52 (Ariz. 2004) (Title VII employment discrimination); Cantu v. State, 930 S.W.2d 594, 597-600 (Tex. Crim. App. 1996) (denial of assistance of counsel); Larry A. DiMatteo, *Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability*, 27 AKRON L. REV. 407, 425-26 (1994) (discussing assignability of personal services contracts).

in which those tools cannot reliably discover the facts, the case-by-case method cannot deliver on its promise of supplying the right result for each case. Reason therefore exists to adopt a *per se* rule. In *Miranda v. Arizona*,[85] for example, the Supreme Court promulgated a kind of *per se* rule in conditioning the admissibility of confessions made under custodial interrogation on the giving of certain warnings, in part because of a dissatisfaction with the ability of courts to reliably discover, through case-by-case adjudication, the true facts relating to the voluntariness of such confessions.[86]

In the following sections, this article explores, in the context of the public defender ineffectiveness claim, the considerations bearing on the choice between the case-by-case rule and the *per se* rule.

1. Policy Considerations

One can frame the policy concerns in various ways. Some advocates of the *per se* rule argue, as we have seen, that undesirable consequences follow from a rule that excuses public defenders from the professional conduct rules applicable to other lawyers.[87] They worry that excluding public defenders from rules otherwise applicable to all lawyers creates a kind of lawyer-caste system that bespeaks a lack of concern for the indigent clients of public defenders.[88]

Advocates of the case-by-case rule have framed the policy question differently. Seeing the question as involving a conflict between loyalty to clients and to colleagues, some courts view collegial and institutional loyalty as something regrettable, to be discouraged to the extent that it compromises loyalty to clients.[89] On that view, the *per se* rule suffers the flaw of recognizing, and therefore perhaps of encouraging, a misplaced

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[85] Miranda v. Arizona, 384 U.S. 436 (1966).

[86] *Id.* at 457-58.

[87] *See, e.g.*, *Angarano*, 329 A.2d at 465 (Gallagher, J., dissenting); People v. Robinson, 402 N.E.2d 157, 161 (Ill. 1979).

[88] *See* Borden v. Borden, 277 A.2d 89, 92-93 (D.C. 1971).

[89] *See, e.g.*, People v. Banks, 520 N.E.2d 617, 620-21 (Ill. 1987); State v. Lentz, 639 N.E.2d 784, 786 (Ohio 1994).

loyalty that the law should discourage.

In response, one might argue that institutional and collegial loyalties are beneficial qualities in public defenders, in that they enhance the quality of client representation. Lawyers perform better when surrounded by supportive and respected colleagues, and a public defender institution strong enough to earn the esteem of its lawyers will benefit their clients by holding the lawyers to high standards of practice.

A third way to frame the policy question focuses not on the consistent application of ethical rules as between public defenders and private lawyers, nor on the desirability of collegial and institutional loyalty. Instead, some courts have focused on the role of public defenders in the criminal justice system, and regarded the choice of rule from the point of view of the desirability of having public defenders available for appointment in such cases.

Some have argued, for example, that public defenders in general better represent their clients than do the private practitioners most likely otherwise to receive the appointments.[90] Other studies have suggested, on the contrary, that indigent clients receive better outcomes when represented by private practitioners than by public defenders.[91] With respect to expense, it bears mention that public defenders may well cost the court system less to appoint than do private practitioners, insofar as public defenders are salaried, and appointed counsel must be paid on a per-case basis.

Such policy considerations, perhaps inevitably, depend on an evaluation of circumstances that may vary at different times and places, and according to the values of the inquirer. Certainly no permanent, universal, or logically-definitive answer can be given to the question of a particular court system's need to conserve funds by appointing the public defender. Neither, perhaps, can one expect to achieve a durable consensus on the value of collegial and institutional loyalty. One's conclusion

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[90] *Robinson*, 402 N.E.2d at 160-61 (reporting State's argument).

[91] *See* Morris B. Hoffman, Paul H. Rubin & Joanna M. Shepherd, *An Empirical Study of Public Defender Effectiveness: Self-Selection by the "Marginally Indigent,"* 3 OHIO ST. J. CRIM. L. 223 (2005) (citing and discussing such studies).

about such questions, as with many questions of policy, depends upon premises not readily susceptible either to challenge or to confirmation.

Therefore, I do not rely on policy considerations in choosing between the *per se* and case-by-case rules. Instead, I find the answer in the second category of considerations: those relating to the practicability of applying a case-by-case approach.

2. Practicability Considerations

The case-by-case approach depends on the assumption that the processes of judicial fact-finding can discover and accurately measure the influence of collegial loyalty in a particular case. If that assumption proves unjustified—if courts cannot reliably discover and measure the influence of collegial loyalty—the case-by-case's method of analysis, and hence its advantage, collapses. In that event, the law has to choose between *per se* rules, or at least between presumptions that, in the absence of reliable evidence, amount in practice to *per se* rules. One *per se* rule would always bar public defenders from litigating claims of ineffective assistance involving colleagues. That is the position of advocates of the *per se* rule that finds some support in the law.

Another possible *per se* rule would always allow a court to appoint a public defender to litigate an ineffectiveness claim involving a colleague. No court has argued for that *per se* rule. Accepting as sound the universal recognition of the possibility that collegial loyalty may sometimes require disqualification, this article will not imagine a controversy where none exists. It shall not, therefore, further discuss that possible rule. The real controversy over the courts' ability to discover and measure the influence presents enough complexity.

(a) A Practical Challenge to the Per Se Rule

Before investigating the capacity of a case-by-case approach reliably to find the facts, one practical challenge to the *per se* rule deserves discussion. Courts should rarely, if ever, establish a *per se* rule that presumes the existence of an unlikely state of

affairs.[92] If, in fact, considerations of collegial or institutional loyalty would influence only a few public defenders in the context of the litigation of an ineffectiveness claim, the law should not, via a *per se* rule, irrebutably presume that those loyalties would influence all public defenders in that context. The establishment of such a counterfactual presumption would bring the law into disrepute. Therefore, even if, as noted above, the advocates of the *per se* rule need not prove the influence of those loyalties on all public defenders, their case fails unless they can credibly show that collegial and institutional loyalties would influence many public defenders.

To answer that challenge without resorting to broad generalizations about public defenders, one may look to the research of social psychologists, who study human social behavior with as much scientific rigor as the subject's nature allows. Other legal scholars have recently taken note of the findings of social psychologists, as the relevance of that discipline's insights become increasingly apparent.[93]

Upon studying the influence of groups on the behavior of their members, social psychologists have noted "[t]he power of group membership to alter attitudes and behaviors . . . ."[94] That power exists even in groups not defined by immutable characteristics or long-term membership.[95] "Ingroup favoritism

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[92] *See* Coleman v. Thompson, 501 U.S. 722, 737 (1991) (finding *per se* rules should be applied only where the presumption they reflect is generally true as an empirical matter).

[93] *See, e.g.*, Samuel N. Fraidin, *Duty of Care Jurisprudence: Comparing Judicial Intuition and Social Psychology Research*, 38 U.C. DAVIS L. REV. 1 (2004); Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983 (2005); Lee Ross & Donna Shestowsky, *Contemporary Psychology's Challenges to Legal Theory and Practice*, 97 NW. U. L. REV. 1081 (2003).

[94] Randall S. Peterson, *Toward a More Deontological Approach to the Ethical Use of Social Influence*, *in* SOCIAL INFLUENCES ON ETHICAL BEHAVIOR IN ORGANIZATIONS 21, 22 (John M. Darley, David M. Messick & Tom R. Tyler eds., 2001) (citing MUZAFER SHERIF, THE PSYCHOLOGY OF SOCIAL NORMS (Gardner Murphy ed., Harper & Brothers 1936)).

[95] *Id.* at 24 (citing HENRI TAJFEL, DIFFERENTIATION BETWEEN SOCIAL GROUPS: STUDIES IN THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS (Henri Tajfel ed., Academic Press 1978) and HENRI TAJFEL, SOCIAL IDENTITY AND INTERGROUP RELATIONS

was found even in groups where there was no basis for discrimination between ingroup and outgroup members (i.e. random selection to membership) . . . . [I]ngroup favoritism and prejudice do not need any basis in history or intergroup conflict."[96]

A manifestation of in-group favoritism relevant here is the "effect known as the *intergroup attributional bias*."[97]

> [The phrase] refers to the finding that positive behaviors by an in-group member are more likely to be attributed to the person's disposition ("He's a nice person") than are those same behaviors when performed by an out-group member, and that negative actions by an in-group member are more likely to be attributed to external reasons ("The heat was getting on his nerves").[98]

The effect prevails only in ambiguous situations, when possible justifications could be advanced for the in-group member's negative actions.[99] When such a possible justification exists, "in-group members are less likely to be held accountable or blamed for negative behaviors or for failures to do something positive."[100] That insight, applied here, suggests that a public defender, when called upon to allege the ineffectiveness of an affiliated public defender, may fail to perceive, and thus to litigate, a claim that an outside lawyer would perceive and litigate. "Coldly objective judgment seems to be reserved for members of out-groups."[101]

No reason exists, so far as I am aware, to regard public defenders as immune from such influences.[102] Therefore,

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(Henri Tajfel ed., Cambridge Univ. Press 1982)).

[96] *Id.* at 24.

[97] Marilynn B. Brewer, *In-group Favoritism: The Subtle Side of Intergroup Discrimination*, *in* CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 166 (David M. Messick & Ann E. Tenbrunsel, eds., 1996).

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.* at 167.

[102] Indeed, legal scholars have relied on the reality of the phenomenon of in-group favoritism in a wide variety of contexts. *See, e.g.*, Rachel Arnow-Richman, *Public Law and Private Process: Toward an Incentivized Organizational Justice Model of Equal*

accepting as valid the research attributing significant influence over behavior of a shared group membership, I conclude that evidence does exist to support the premise that many public defenders would be influenced by the collegial or institutional bond joining them with a lawyer subject to an ineffective assistance of counsel claim.

(b) Practical Challenges to the Case-by-Case Rule

The strongest critique of the case-by-case rule challenges the claim that it can reliably discover and measure the influence of collegial or institutional loyalty on particular public defenders in particular cases.[103] The law reasonably depends on judicial fact-finding procedures to find a great many facts. However, the presence of several circumstances, in combination, can render judicial fact-finding unreliable as a method for discovering and measuring the influence of collegial loyalty.

(i) The Search for Future Facts

First, most facts subjected to judicial investigation involve a past or current event, circumstance, or state of affairs. In criminal trials, for example, courts seek to discover the truth about a past crime. Sometimes, as with the investigation of a defendant's competency to stand trial, courts investigate a current circumstance.

The degree to which a public defender's collegial or

Employment Quality for Caregivers, 2007 UTAH L. REV. 25, 39 (2007) (employment setting); Angela P. Cole & Ewart A.C. Thomas, *Group Differences in Fairness Perceptions and Decision Making in Voting Rights Cases*, 30 LAW & HUM. BEHAV., 543 (2006); John A. Fortunato & Jef Richards, *Reconciling Sports Sponsorship Exclusivity with Antitrust Law*, 8 TEX. REV. ENT. & SPORTS L. 33, 41 (2007); Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623 (2005); Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO L. J. 1 (2004); Kim, *supra* note 93, at 995-99; Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L. J. 961, 1002 (2006) (employment setting); *see also* Brewer, *supra* note 97.

[103] Scholars have noted the problem of "adjudication error" that can arise when courts apply a case-by-case analysis to issues difficult for courts to resolve. *See, e.g.*, Evan H. Caminker, *Miranda and Some Puzzles of "Prophylactic" Rules*, 70 U. CIN. L. REV. 1, 8-12 (2001).

institutional loyalty will influence his or her representation, however, typically requires a court to make a finding about a future state of affairs. At the time a court must decide whether to appoint a public defender to litigate a colleague's ineffectiveness, the court and the public defender will know facts about the nature of the relationship between the two lawyers, such as whether one has supervisory responsibility over the other. However, at that time, neither the court nor the post-conviction public defender may know much about the details of the ineffectiveness claim. Few lawyers, before being appointed to a case, will have undertaken much investigation of the circumstances of that case. The lawyer may not know the details of the client's claim and may know still less how the colleague will account for the challenged aspect of the colleague's performance on the case.

Without that knowledge of the details of the case, the appointed lawyer's self-assessment of the influence of collegial loyalty will necessarily be abstract in the extreme. For example, an ineffectiveness claim that, upon investigation, reveals alcoholism-related impairment of a lawyer's judgment presents a colleague with a very different litigation prospect than does an ineffectiveness claim that reveals only an investigator's failure to locate an important witness. At the time of appointment of defense counsel, neither the court nor the lawyer may know how the ineffectiveness claim will develop, and therefore will be in a poor position to predict how the claim's future development will implicate considerations of collegial loyalty.

The investigation of past facts can, of course, also prove difficult, especially the more distant in the past the occurrence under investigation. The investigation of a future circumstance, however, necessarily involves a kind of speculation not required of the inquiry into a past event.

(ii) Limited Sources of Evidence

Second, partly because of the future-directed nature of the inquiry, courts seeking to apply the case-by-case rule can expect usually to draw upon very limited sources of evidence. Indeed, given that the inquiry focuses on the future influence of collegial

loyalty on a particular public defender, courts can expect to receive very little evidence beyond the self-assessment of that public defender. No other person, nor any non-testimonial evidence, seems likely to shed much light on the question.

Perhaps the case-by-case courts will avoid that difficulty by developing over time a body of jurisprudence attributing dispositive significance to objective, readily ascertainable circumstances. For example, they may disqualify a public defender if, and only if, the public defender has a supervisory relationship with the allegedly ineffective lawyer, or whenever the two work together in the same office. Thus, rather than weighing the self-assessment of the public defender in question, case-by-case courts would create a case-by-case rule that is itself a kind of *per se* rule, which identifies a subset of all affiliated public defenders and automatically disqualifies only all the lawyers within that subset. The inability to give content to the case-by-case rule with factors subject to variation by degree, bespeaks the challenge confronting a case-by-case analysis in the context of highly limited sources of evidence.

(iii) Ineffability of the Fact

Third, a case-by-case analysis confronts the difficulty that the fact it seeks to investigate—the influence on the appointed lawyer of collegial loyalty—constitutes a very subtle matter, as to which even the lawyer may have little reliable insight.[104] To be sure, courts frequently have to investigate subtle, psychological facts. Factual disputes relating to criminal mens rea, for example, can involve much subtlety.

Nevertheless, the challenge in the context of discovering the influence of a public defender's collegial and institutional loyalties is at least as great, if not greater, than the challenge of discovering the mens rea of a criminal defendant. Here, developments in social psychology research again support that

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[104] *See id.* at 10 (making similar point in *Miranda* context, in noting that even if the historical events can be established "it still remains difficult, perhaps conceptually impossible, for the court to construct a metric by which to determine whether a particular defendant's will was actually 'overborne' by those events").

conclusion. Social psychologists have identified a phenomenon they have called "the fundamental attribution error."[105] "[T]he fundamental attribution error is the tendency for attributers to underestimate the impact of situational factors and to overestimate the role of dispositional factors in controlling behavior."[106] In other words, people tend to overestimate the strength of their own disposition in controlling their behavior, while underestimating the influence of aspects of their situation, such as their employment setting. That insight, applied to the present issue, suggests that lawyers will tend to underestimate the significance of collegial and institutional loyalty in assessing the likely influence of those factors over their own behavior.[107]

(iv) Non-Adversarial Fact-Finding

Finally, a fourth challenge undermines the capacity of courts using a case-by-case approach to discover and measure the extent of the influence of collegial loyalty. The Supreme Court has described cross-examination as "the greatest legal engine ever invented for the discovery of truth."[108] In this context, however, a court investigates largely without adversarial cross-examination and largely without prosecutorial participation. In few of the reported cases in which the issue arises before adjudication of the ineffectiveness claim do courts report prosecutors as taking a position opposed to that of defense counsel as to whether the court should appoint an affiliated public defender or some other lawyer to represent the

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[105] Alan Strudler & Danielle E. Warren, *Authority, Heuristics, and the Structure of Excuses*, *in* SOCIAL INFLUENCES ON ETHICAL BEHAVIOR IN ORGANIZATIONS 155, 157 (John M. Darley et al. eds. 2001) (citing Lee Ross & Craig A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 129, 135-38 (Daniel Kahneman et al. eds. 1982))

[106] *Id.*

[107] This phenomenon may be a specific application of the more general principle, also well-established by social psychologists that people tend to have poor awareness of their own biases. *See generally* Deborah Goldberg et al., *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 525 n.120 (2007).

[108] California v. Green, 399 U.S. 149, 158 (1970).

defendant.[109] Insofar as one of the parties will often make no contribution to the evidentiary record on which a court must rely in deciding what lawyer to appoint, that absence of participation further undermines the capacity of the court to reliably apply a case-by-case rule.

(c) Conclusion

Social psychology informs us that the setting in which a person works will have significant influence over the person's working behavior. Thus, it follows that, in some significant number of cases, lawyers appointed to litigate ineffectiveness claims will be influenced, in their litigation decisions, by their professional affiliation with the lawyer who is the object of those claims. Courts, however, cannot rely on a case-by-case approach to identify those cases in which the affiliation would adversely affect a particular lawyer's representation. For the reasons stated above, that approach cannot, in this context, deliver on its promise of ability to distinguish those cases in which an adverse affect would arise from those in which it would not. The collegial loyalty concern, therefore, justifies adoption of a *per se* rule.

B. For Money?: The Financial Interest

The Supreme Court has considered on at least two occasions issues that have led the Court to comment on the existence and extent of financial incentives affecting lawyers practicing in non-profit, public interest organizations.[110] Both cases involved efforts by states to prohibit solicitation of

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[109] *See, e.g.*, Morales v. Bridgforth, 100 P.3d 668, 670 (N.M. 2004) (noting concurrence between prosecution and defense counsel); State v. Veale, 919 A.2d 794, 796 (N.H. 2007) (noting that State concurred with defense counsel's position); Garland v. State, 657 S.E.2d 842, 845 (Ga. 2008) (noting that, in trial court, prosecutor declared that State did not "have a dog in the fight" about whether to appoint new counsel on appeal in a case involving a claim of ineffective assistance). The prosecution, reasonably and unsurprisingly, does tend to take a position when the matter is litigated post-adjudication of the claim; in such circumstances, the State seeks the rule that leads to the affirmation of the conviction; *see also People v. Thompson*, 477 N.E.2d 532, 533 (Ill. App. Ct. 1985).

[110] *In re* Primus, 436 U.S. 412 (1978); NAACP v. Button, 371 U.S. 415 (1963).

potential plaintiffs by such lawyers. In *Button*, the Court found: "no showing of a serious danger here of professionally reprehensible conflicts of interest . . . partly because no monetary stakes are involved, and so there is no danger that the attorney will desert or subvert the paramount interests of his client to enrich himself . . . ."[111] In *Primus*, the Court noted that the lawyer's conduct "was not in-person solicitation for pecuniary gain. . . . And her actions were undertaken to express personal political beliefs . . . rather than to derive financial gain."[112]

Those rulings support the conclusion that lawyers employed by non-profit entities and engaged in public interest work differ from private lawyers in a respect relevant to the conflict of interest rules. Such lawyers lack the kind of financial interest in the outcome of their cases that can give rise, in private lawyers, to a disqualifying conflict of interest.

The financial interest argument, in itself, cannot decide the question in favor of the case-by-case rule. Even if a financial interest exerts more influence on a lawyer than does any other kind of interest, that fact would not advance very far the resolution of the dispute. The strength of the financial influence does not, in this context, diminish the strength of the loyalty influence, insofar as the issue does not pit those influences against each other. Rather, the issue confronts collegial or institutional loyalty with the interest in a zealous presentation of an ineffective assistance claim. The conclusion that a financial interest necessarily requires the disqualification of a lawyer does not exclude the possibility that some other consideration might also necessarily require the disqualification of a lawyer. The immunity of public defenders from the financial ground for disqualification does not establish their immunity from all possible grounds for disqualification.

IV. CONCLUSION

In the end, no resolution of the matter seems entirely

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[111] *Button*, 371 U.S. at 443.

[112] *Primus*, 436 U.S. at 422; *see also id.* at 437.

satisfactory. The case-by-case rule suffers a practical defect. In requiring courts to identify and measure the influence of collegial loyalty, it sets a task at which courts all too often must fail. The *per se* rule avoids that error, but at a cost. The *per se* rule bars courts from appointing a lawyer even when it seems clear that the affiliation with the allegedly ineffective lawyer would not inhibit the appointed lawyer's advocacy of the ineffectiveness claim. This article concludes that the law should accept the cost of the *per se* rule in preference to the case-by-case approach's error, because the *per se* rule better accommodates the reality of a court system equipped with imperfect fact-finding tools.

In response to that claim of superior accommodation of reality, one might counter with a practical challenge. If courts cannot appoint public defenders to litigate such claims, their awareness of the greater expense of appointing private counsel may lead them not to appoint any lawyer, at least when not constitutionally required to do so. In that event, a rule designed to provide unconflicted counsel to indigent prisoners could deprive some proportion of prisoners of counsel altogether. In the context of civil legal services, one scholar has advocated a kind of case-by-case approach to disqualification for exactly that reason.[113]

That practical challenge only has force in circumstances in which a court has discretion whether to appoint counsel. It does not apply when, as on direct appeal of a criminal conviction, the Constitution requires appointment of counsel.[114] Nevertheless, the challenge raises a point worth considering, insofar as claims of ineffective assistance will often be raised in post-conviction proceedings, when no constitutional right to counsel exists. Will judges who would otherwise have exercised their discretion to appoint a lawyer in such a case, choose to appoint no lawyer when the law bars appointment of a public defender?

The answer to that question may well vary, from judge to

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[113] David H. Taylor, *Conflicts of Interest and the Indigent Client: Barring the Door to the Last Lawyer in Town*, 37 ARIZ. L. REV. 577 (1995).

[114] *See* Douglas v. California, 372 U.S. 353 (1963).

judge and from jurisdiction to jurisdiction. An empirical survey could, perhaps, answer the question, at least as to the judges surveyed at that particular instance. Some reason exists, though, to suspect that the *per se* rule may have, in general, no great inhibiting effect on discretionary appointments of counsel.

For the inhibiting influence of cost to affect a substantial number of cases, it must outweigh the countervailing considerations that would otherwise prompt the judge to appoint counsel. One must therefore identify and measure those considerations. Why do judges ever exercise their discretion to appoint counsel to litigate a claim of ineffective assistance?

The inclination to exercise the discretion to appoint counsel correlates, I suspect, with a judge's perception of the possible merits of the ineffectiveness claim. If a judge perceives an ineffectiveness claim as frivolous, the judge is unlikely to choose to appoint any lawyer, public defender or private counsel, to advance that claim. Rather, judges will feel inclined to appoint counsel only in those cases in which they believe that, with the assistance of counsel, a prisoner has some chance of actually proving the claim. To put the matter even more plainly, judges will most likely appoint counsel in cases in which they suspect that the prisoner's trial counsel may have rendered ineffective assistance.

If one accepts that premise, the cost consideration faces a considerable countervailing influence. On the one hand, as evidenced merely by the judge's inclination to appoint counsel, the judge feels some concern that trial counsel's performance may have compromised the integrity of the verdict in the case. In a case involving a lengthy prison sentence, that concern equates to an acknowledgment of the possibility that trial counsel's performance may forebode years, even decades, of unjustified imprisonment. On the other hand, the appointment of private counsel to litigate the claim will require some expenditure of scarce indigent defense funds.

I suspect that judges, faced with that choice, will most often appoint counsel, at least when they perceive the doubts about trial counsel's performance to rest on more than mere speculation. In making that prediction, I acknowledge a certain

tension with the skepticism expressed above with respect to the ability of judges to discover and measure the inhibiting influence on advocacy of collegial loyalty. The *per se* rule, thus, ultimately rests on a composite foundation, combining an aspect of skeptical realism with an aspect of idealism. The argument for the *per se* rule doubts the ability of judges to discover, through the fact-finding tools available to them, the existence and inhibiting extent of collegial loyalty. These concluding observations reveal, however, that the argument also rests to some extent on idealism about the desire of judges to see justice done in the cases before them, even when justice has a monetary cost.

GIVING PROMISES FORCE: ALLOWING DEBTOR'S BREACH OF CONTRACT CLAIM DESPITE POSITION TAKEN IN BANKRUPTCY

*Meredith A. Wegener**

"To have force in a particular case promises must be assumed to have force generally."[1]

INTRODUCTION

Autonomy and freedom are unmistakable when two parties choose to contract with one another. Whether it is an individual selecting a cell phone carrier contract or a nationwide hamburger chain selecting its beef supplier contract, the parties freely choose to enter into a rights-creating agreement. Yet, if the individual with the cell phone contract or the hamburger chain files for bankruptcy and fails to "schedule" a known breach of contract claim against the cell phone carrier or the beef supplier during the course of the bankruptcy, the contractual rights of the parties—their autonomy and the freedom—may be extinguished through the application of judicial estoppel. A

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[1] CHARLES FRIED, CONTRACT AS PROMISE, 12 (Harvard University Press 1981) (emphasis removed).

contractual regime can and must maintain the contract as promise, including the anticipated consequence of suit in the instance of breach. The contractual rights upon which the parties evaluated their contractual arrangement at its creation should not be altered.

A debtor who seeks the benefits of bankruptcy has a duty to schedule and disclose, "for the benefit of creditors, all his interests and property rights."[2] The duty to disclose is "a continuing one that does not end once the forms are submitted to the bankruptcy court."[3] The assets that must be listed include such obvious items as real property, financial accounts, executory contracts, and unexpired leases.[4] The schedule must also include claims for recovery in ongoing lawsuits and claims for recovery that may not have been filed in a lawsuit but are known to exist.[5]

Notwithstanding the clear obligation of debtors in bankruptcy, debtors often fail to disclose potential, unfiled claims. The reasons for not listing vary from a lack of understanding of what needs to be listed,[6] to an uncertainty about the validity of the claim itself,[7] to acting in unmistakable bad faith with the bankruptcy court.[8] The unlisted claims range from employment discrimination[9] to legal malpractice[10] and every civil claim in between. This article, however, is specifically concerned with courts that apply the doctrine of

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[2] Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 417 (3d Cir. 1988) (citing *In re* Hannan, 127 F.2d 894 (7th Cir. 1942)). *See also* 11 U.S.C. §§ 521(1), 1125 (2000).

[3] Tennyson v. Challenge Realty (*In re* Tennyson), 313 B.R. 402, 406 (Bankr. W.D. Ky. 2004).

[4] § 521; § 1125(a)(1); Bankr. R. 1007(b)(1); Official Bankruptcy Form 6 (2007).

[5] *Id.*

[6] Cohen *ex rel.* Engelbrecht v. Arlington Heavy Hauling, Inc. (In *re* Engelbrecht), 368 B.R. 898 (Bankr. M.D. Fla. 2007).

[7] Dallas Sales Co. Inc. v. Carlisle Silver Co., Inc., 134 S.W.3d 928 (Tex. App. 2004); Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp., 337 F.3d 314 (3d Cir. 2003).

[8] Ortlieb v. Hudson Bank, 312 F. Supp. 2d 705 (E.D. Pa. 2004), *aff'd sub nom.* Estate of Ortlieb v. Hudson United Bank, 2005 U.S. App. LEXIS 5175 (3d Cir. 2005).

[9] Richardson v. United Parcel Serv., 195 B.R. 737 (Bankr. E.D. Mo. 1996).

[10] Freishtat v. Blair (*In re* Blair), 319 B.R. 420 (Bankr. D. Md. 2005).

judicial estoppel to debtors who fail to list breach of contract claims. This analysis excludes tort, patent, and other non-contractual claims and excludes instances where courts resolve this issue through other doctrines aside from judicial estoppel.[11]

In application of Charles Fried's contract-as-promise theory, courts should enforce broken contracts, and judicial estoppel of bankrupt debtors' unscheduled breach of contract claims should be abandoned. An expanded discussion of Fried's theory follows, but the following suffices to say for introducing this analysis: "[w]hether or not a person has promised is a yes or no question. If he has, he is judged by the regime of promise. If he has not, some other regime controls."[12] "A contractual regime must maintain the integrity of bargains, and this means not reversing the allocation of risks on which the parties evaluated their bargain when they made them."[13] In other words, a contract is a promise, and "contract law does justice in society by enforcing those promises that, morally, the promisor ought to have kept."[14] A breaching party should not be permitted to succeed in breaching a contract without repercussions for the simple reason that the injured party failed to list the future claim for breach during a bankruptcy proceeding.

The Federal Reserve indicates that "household debt is at a record high relative to disposable income."[15] "A high level of indebtedness among households could lead to increased household delinquencies and bankruptcies."[16] The number of businesses filing for bankruptcy *is* presently on the rise.[17]

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[11] *See In re* Phoenix Petroleum Co., 278 B.R. 385 (Bankr. E.D. Pa. 2001); Benjamin J. Vernia, Annotation, *Judicial Estoppel of Subsequent Action Based on Statements, Positions, or Omissions as to Claim or Interest in Bankruptcy Proceeding*, 85 A.L.R.5th 353 (2007).

[12] FRIED, *supra* note 1, at 113.

[13] *Id.* at 117.

[14] Lewis A. Kornhauser, *The Resurrection of Contract*, 82 COLUM. L. REV. 184, 196 (1982).

[15] American Bankruptcy Institute, http://www.abiworld.org/Content/NavigationMenu/NewsRoom/BankruptcyStatistics/Bankruptcy_Filings_1.htm (Last visited Oct. 30, 2008).

[16] *Id.*

[17] Emily Kaiser, *In Weak Economy, Americans Swap Steak for Chicken*, March 12, 2008, http://www.reuters.com/article/topNews/idUSN1217065520080312 (Last visited

Accordingly, a theory-based but practical answer addressing an issue that already exists and is only likely to increase in frequency, undisclosed broken contracts, is critical. In application of the contract-as-promise theory to unscheduled breach of contract claims, these claims should be permitted to proceed. Judicial estoppel and its extinguishing of contractual rights of debtors and likely the rights of creditors should no longer be the result. Protecting the integrity of the judicial system can be found in the distribution of damages and not in the denial of prosecution.

Part I details the status of the current bankruptcy system and the details of the use of judicial estoppel in the instances where debtors fail to disclose breach of contract claims. Part II discusses Fried's contract-as-promise theory with specific consideration given to debtors and the recovery for breach of contract. In application of Fried's theory, Part III specifies the argument for abandoning judicial estoppel, allowing the pursuit of debtors' breach of contract claims that are unscheduled or undisclosed, and the resulting practical effects of this modification.

I. BANKRUPTCY LAW REQUIRES COMPLETE TRUTH FROM DEBTORS

A. The Law's Obligations to List and Disclose

The United States Bankruptcy Code, Section 521, lists certain duties of debtors in bankruptcy cases.[18] This list includes a debtor's duty to file the following: a list of creditors, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs.[19] Complete honesty is the expected standard for anyone commencing a bankruptcy case, including the listing

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Oct. 30, 2008).

[18] 11 U.S.C. § 521 (2000).

[19] *Id.*; *see generally* Joe Lee, *Debtor's Duties*, *in* 2E BANKRUPTCY SERVICE LAWYER'S EDITION § 26:7 (2007).

of assets.[20] Quite simply, the veracity of a debtor's statements is essential to successful administration of the Bankruptcy Code.[21] "The bankruptcy process relies on a debtor to make a complete, full, and honest disclosure of all required information."[22] The debtors' absolute duty in a bankruptcy action to report whatever interests they hold in property includes reporting assets that they may believe are worthless or unavailable to the bankruptcy estate.[23]

A debtor's duty to disclose all assets (or potential assets) to the bankruptcy court is a continuing one that does not end once the information is submitted to the bankruptcy court; rather, a debtor must amend his financial statements if circumstances change.[24] With specific concern for the changes in circumstances, debtors filing bankruptcy under Chapter 11 or 13 must disclose all legal or equitable interests in property as of the commencement of the case, as well as any interests in property the bankruptcy estate acquires after the commencement of the estate. A Chapter 7 debtor, however, retains possession of property acquired after the commencement of the bankruptcy case and, thus, has no duty to disclose after-acquired property.[25]

In Chapter 11 of the Bankruptcy Code, we find another mechanism similar to the schedule of assets that demands the same level of truthfulness from debtors—the *post-petition* disclosure in Chapter 11.[26] A Chapter 11 disclosure statement must contain "adequate information" in order to be approved by

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[20] *See In re* Armwood, 175 B.R. 779, 785 (Bankr. N.D. Ga. 1994); *In re* Trout, 108 B.R. 235 (Bankr. D.N.D. 1989). *See also* Lee, *supra* note 19.

[21] *See* § 101 *et seq.*; Chalik v. Moorefield (*In re* Chalik), 748 F.2d 616, 618 (11th Cir. 1984); Jensen v. Slater (*In re* Slater), 318 B.R. 881 (Bankr. M.D. Fla. 2004); Lee, *supra* note 19, at § 26:9.

[22] Yoppolo v. Sayre (*In re* Sayre), 321 B.R. 424 (Bankr. N.D. Ohio. 2004); *see also* § 727.

[23] *See* Stephenson v. LeBoeuf, 16 S.W.3d 829, 841 (Tex. App. 2000); Stewart v. Hardie, 978 S.W.2d 203 (Tex. App. 1998); Lee, *supra* note 19, at § 26:9.

[24] § 521(1); § 541(a)(7); *see also* Ajaka v. Brooksamerica Mortgage. Corp., 453 F.3d 1339 (11th Cir. 2006); Lee, *supra* note 19, at § 26:10.

[25] Chandler v. Samford Univ., 35 F. Supp. 2d 861, 879 (N.D. Ala. 1999); Brassfield v. Jack McLendon Furniture, Inc., 953 F. Supp. 1424, 1432 (M.D. Ala. 1996); Lee, *supra* note 19, at § 26:10.

[26] § 1125; *See also* 9C AM. JUR. 2D *Bankruptcy* § 2887 (2007).

the court.[27] Thus, adequate information is the standard for disclosure under Chapter 11,[28] and "adequate information" is defined by the Bankruptcy Code, for purposes of post-petition disclosure and solicitation of plan acceptances or rejections, as meaning information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan.[29] Consequently, an acceptance or rejection of a plan may not be solicited after the commencement of a Chapter 11 case from a holder of a claim or interest with respect to such claim or interest unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information.[30]

Similar to the debtor's listing duties in § 521, to provide "adequate information" sufficient for confirmation of a proposed Chapter 11 plan under § 1125, the disclosure statement should disclose all litigation likely to arise in the non-bankruptcy context, bankruptcy-related litigation that is likely to arise, and any bankruptcy litigation that a plan proponent expects to bring against known creditors with known claims who have the right to be involved in the confirmation process and who can still timely file claims.[31]

As indicated, the duty of disclosure in a bankruptcy

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[27] *See* 9C AM. JUR. 2D *Bankruptcy* § 2890 (2007).

[28] West v. Family Express Corp. (*In re* Bilstat, Inc.), 314 B.R. 603 (Bankr. S.D. Tex. 2004). *See also* 9C AM. JUR. 2D, *supra* note 27, at § 2890.

[29] § 1125(a)(1); *see* 9C AM. JUR. 2D, *supra* note 27.

[30] *Id. See also* Bank of New York, 860 F.2d 94, 100 (3d Cir. 1988); *In re* Phoenix Petroleum Co., 278 B.R. 385 (Bankr. E.D. Pa. 2001); 9C AM. JUR. 2D, *supra* note 27, at §2887.

[31] Mickey's Enters., Inc. v. Saturday Sales, Inc. (*In re* Mickey's Enters., Inc.), 165 B.R. 188 (Bankr. W.D. Tex.1994); Westland Oil Dev. Corp. v. MCorp Mgmt. Solutions, Inc., 157 B.R. 100 (Bankr. S.D. Tex.1993); *In re* Cardinal Congregate I, 121 B.R. 760 (Bankr. S.D. Ohio 1990).

proceeding is an ongoing one, and the debtor is required to disclose all current and potential causes of action in their filings.[32] "[T]he debtor need not know all the facts or even the legal basis for the cause of action; rather, if the debtor has enough information . . . prior to confirmation to suggest that it may have a possible cause of action, then that is a 'known' cause of action such that it must be disclosed."[33] Any claim with potential must be disclosed, even if it is "contingent, dependent or conditional."[34]

B. The Law's Response to the Failure to Disclose or List

What happens when a debtor fails, for whatever reason, to list or disclose a potential cause of action during the course of bankruptcy proceedings? Among many results and consequences, the doctrine of judicial estoppel may bar a debtor's assertion of a claim in a subsequent proceeding that was not identified as an asset in a prior bankruptcy proceeding, if the assertion of the claim in the subsequent proceeding is inconsistent with the earlier non-disclosure.[35] Generally, the doctrine of judicial estoppel seeks to preclude a party from asserting one position in one judicial proceeding after having successfully asserted a contrary position in the prior proceeding.[36] While courts utilize other means to address same and similar litigant action, including equitable estoppel, res judicata, and even simply disregarding the matter, this analysis is limited to those courts that tackle this issue with judicial estoppel.[37]

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[32] § 521(a)(1); *See* Modanlo v. Khan (*In re* Modanlo), 342 B.R. 238 (D. Md. 2006); Costello v. Costello (*In re* Costello), 255 B.R. 110, 145 (Bankr. E.D.N.Y. 2000); Youngblood Group v. Lufkin Fed. Sav. & Loan Ass'n, 932 F. Supp. 859, 867 (E.D.Tex. 1996); Lee, *supra* note 19, at § 26:10.

[33] *See* Union Carbide Corp. v. Viskase Corp. (*In re* Envirodyne Indus., Inc.), 183 B.R. 812, 821 n.17 (Bankr. N.D. Ill. 1995); *See also* § 521(a)(1).

[34] § 521(a)(1); *See Westland Oil Dev. Corp.*, 157 B.R. 100 at 103.

[35] *See* Chandler v. Samford Univ., 35 F. Supp. 2d 861 (N.D. Ala. 1999); Lee, *supra* note 19, at § 26:12.

[36] § 701 *et seq*; *see* Benton v. Benton, 629 S.E.2d 204 (Ga. 2006).

[37] *See* Smith-Lyon v. Trustmark Nat'l Bank (*In* re Gunsmith's Inc.), 271 B.R. 487 (S.D. Miss. 2000) (holding debtor must disclose any cause of action likely to arise, and

"Judicial estoppel is a common law principle that applies when a party tries to contradict his or her own sworn statement given in prior litigation."[38] While its application may vary in form, judicial estoppel has been adopted in a majority of jurisdictions.[39] Importantly, "[i]t is designed to protect the integrity of the judicial process by preventing a party from 'playing fast and loose' with the courts to suit the party's own purposes."[40] "The primary purpose of the doctrine is not to protect litigants," but rather the fair administration of justice.[41] "In other words, it is [often] used to prevent the use of intentional self-contradiction as a means of obtaining unfair advantage."[42] Accordingly, when a debtor fails to disclose the potential breach of contract claim in bankruptcy, his omission is tantamount to taking the position that such a claim does not exist. This omission allows courts to apply judicial estoppel in future proceedings to bar the claim.

II. CONTRACT-AS-PROMISE THEORY: PROMISES HAVE LEGAL FORCE

Charles Fried's contract-as-promise theory asserts that contracts are promises that have not only moral force but also legal force. "[S]ince a contract is first of all a promise, the contract must be kept because a promise must be kept."[43] Once

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failure to do so will trigger application of doctrine of equitable estoppel to preclude subsequent attempt by debtor to prosecute this cause of action in non-bankruptcy context). *See also* Vernia, *supra* note 11.

[38] Stewart v. Hardie, 978 S.W.2d 203, 208 (Tex. App. 1998); *See also* New Hampshire v. Maine, 532 U.S. 742, 751 (2001) (noting specifically that "[w]e do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional concerns may inform the doctrine's application . . . ."); Brandon v. Interfirst Corp., 858 F.2d 266, 268 (5th Cir. 1988).

[39] Robert F. Dugas, *Honing a Blunt Instrument: Refining the Use of Judicial Estoppel in Bankruptcy Nondisclosure Cases*, 59 VAND. L. REV. 205 (2006) (providing a detailed discussion of the application of judicial estoppel in the instances of bankruptcy nondisclosure).

[40] *Stewart*, 978 S.W.2d at 208; Ergo Science, Inc. v. Martin, 73 F.3d 595, 598 (5th Cir. 1996).

[41] *Stewart*, 978 S.W.2d at 208. *See also Brandon*, 858 F.2d at 268.

[42] *Stewart*, 978 S.W.2d at 208.

[43] FRIED, *supra* note 1, at 17.

we make the assumption that "to have force in *a particular case* promises must be assumed to have force generally," "the effects we intentionally produce by a particular promise may be morally attributed to us."[44] The logic of Fried's theory is simple: the most basic principle of contract law is that there can be no legally enforceable obligation without a promise, a commitment to future behavior.[45]

> The obligation to keep a promise is grounded not in arguments of utility but in respect for individual autonomy and in trust. Autonomy and trust are grounds for the institution of promising as well, but the argument for *individual* obligation is not the same. Individual obligation is only a step away, but that step must be taken. An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function it is to give grounds—moral grounds—for another to expect the promised performance.[46]

In characterizing contracts as promises with legal and moral force, it follows that said contracts must be kept or damages for breach must result.[47] Fried argues that expectations should serve as the measure of damages for broken promises/breached contracts: "[t]he expectation standard gives the victim of a breach no more or less than he would have had had there been no breach—in other words, he gets the benefit of his bargain."[48] Many scholars have argued about what should be the measure of damages (expectation, restitution, reliance, or punitive) awarded in the instance of a contract breach, but for our purposes, regardless of the *measure* of damages awarded, breaches of contract as moral and legal promises require recovery following breach.[49] Respect for others as free and

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[44] *Id.*

[45] *See* Kern v. Levolor Lorentzen, Inc., 899 F.2d 772, 785 (9th Cir. 1990). (Kozinski, J., dissenting) (explaining that "it is the most fundamental principle of contract law that there can be no legally enforceable obligation without a promise, a commitment to future behavior.").

[46] FRIED, *supra* note 1, at 16 n.17.

[47] *Id.* at 17.

[48] *Id.* at 17 n.18.

[49] *Id.* at 17.

rational requires taking seriously their capacity to determine their own values, and "that respect means allowing people to take responsibility for the good they choose."[50] It is in taking the responsibility, the accountability and the respect for others, that we find contract-as-promise theory's requirement of damages for breach.

Although Fried does not focus or apply his theory to post-bankruptcy judicial estoppel, in addressing bankruptcy he notes, "contractual partners generally treat bankruptcy as a risk to the successful conclusion of their ventures."[51] The contracting partners' potential bankruptcy risk evaluation should be limited to future debtor-versus-creditor issues in the contract formation phase, not an evaluation of whether to breach a deal with a now-likely insolvent partner in the hopes that the breached claim will be omitted in bankruptcy.

Fried acknowledges that the promissory principle, the notion of contract as promise, does not necessitate "that all disputes between people who have tried but failed to make a contract or who have broken a contract must be decided solely according to that principle."[52] In so acknowledging the restrictions of the theory, Fried indicates that where the promissory principle does not resolve the issue at hand, one may look to other areas of law, such as tort or restitution.[53] Here, the contract-as-promise construct *does* find its applicability to post-bankruptcy judicial estoppel with no need to seek out other areas of law to resolve contract breaches.

While it is Fried's construct that is specifically utilized in the analysis herein, Fried does not stand alone in relating "the legal institution of contract to the moral institution of promising."[54] In fact, Fried relies heavily on Kant, Raz, and Locke in establishing his theory in the first instance.[55] For

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[50] *Id.* at 20.

[51] *Id.* at 108.

[52] *Id.* at 27.

[53] *Id.* at 26-27.

[54] Charles Fried, *The Convergence of Contract and Promise*, 120 HARV. L. REV. F. 1 (2007).

[55] FRIED, *supra* note 1, at 16 n.17.

Kant, keeping one's promise is a classic example of a strong, categorical obligation all individuals have.[56] "[U]nlike obligations created by mere vows or requests of friends, [promising] is a very strong obligation."[57] Promising is "the execution of a normative power: we create an obligation by the act of promising."[58] Joseph Raz asserted that:

> [P]romises (including contractual promises) create a "special bond" among the parties to them and that the value of this bond might explain the distinctive character of promissory (and also contractual) obligation, including why persons feel bound to keep their promises (and also their contracts) even when doing so does not produce the best result overall.[59]

Similarly, Locke (and Hobbes) maintained that "[t]he necessity of government was to add currency to promises and add sanctions to the violation of respect—for others' rights and for voluntary commitments to others when consideration was agreed upon."[60]

In a later, more contemporary publication, Fried further elucidated his theory in the process of explaining where he believes that he and contemporary Professor Seana Shiffrin[61] are aligned in thought with respect to the contract-as-promise theory:

> We see contract and promise not as institutional homonyms for each other, but rather contract as rooted in, and underwritten

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[56] Michael S. Moore, *Four Reflections on Law and Morality*, 48 WM. & MARY L. REV. 1523, 1562 (2007) (citing IMMANUEL KANT, THE MORAL LAW: GROUNDWORK OF THE METAPHYSIC OF MORALS 70-71 (H.J. Paton ed. & trans., Harper & Row 3d ed. 1964).

[57] *Id.*

[58] *Id.* (citing J. Raz, *Promises and Obligations,* in LAW, MORALITY, AND SOCIETY 210, 210-28 (P.M.S. Hacker & J. Raz, eds., 1977).

[59] Daniel Markovits, *The No-Retraction Principle and the Morality of Negotiations*, 152 U. PA. L. REV. 1903, 1914, (2004). *See also* Hanoch Sheinman, *Contractual Liability and Voluntary Undertakings*, 20 OXFORD JOURNAL OF LEGAL STUDIES 205 (2000) (arguing that the purpose of contractual liability is to support the practice of voluntary obligations).

[60] Donald J. Kochan, *Boyakasha, Fist to Fist: Respect and the Philosophical Link with Reciprocity in International Law and Human Rights*, 38 GEO. WASH. INT'L L. REV. 349, 355 (2006).

[61] Seana Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. (2007).

> by, the morality of promising, just as more generally the regime of law and the regime of morality are not mere homonyms.[62] Law can be, should be, but need not be a set of institutions that underwrite, facilitate, and enforce the demands and aspirations of morality in our dealings with each other.[63] It is therefore entirely appropriate that various legal institutions resemble the moral institutions which they partially instantiate. Contract and promise are like that. It is because the legal institution of contract is grounded in the moral institution of promise—as the standard legal doctrine of the subject cited by Professor Shiffrin testifies—that we both expect congruence between the two, but also demand an explanation when the two diverge.[64]

While Fried responds to Professor Shiffrin's address of the divergences between the legal institution of contract and the moral institution of promise, it is with the convergence of the two institutions that we are concerned here; or at a minimum, an attempt to change what could be considered a divergence into a convergence.

III. THE THEORY APPLIED: PROMISES GIVEN FORCE NOTWITHSTANDING DEBTORS' POSITION TAKEN IN BANKRUPTCY

In utilizing the contract-as-promise theory of contractual obligations, we find that bankruptcy courts' decisions to judicially estop debtors from pursuing breach of contract claims not listed in their bankruptcies leaves not only loose ends, but the unmistakable result of denying the legal and moral force of contracts. The application of this theory to this setting may stretch the limits of the theory, but it is through addressing the obstacles discovered in its application that we not only challenge the status quo of a judicial construct but also challenge the

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[62] Fried, *supra* note 54.

[63] *Id.* (citing IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS 23 (John Ladd trans., Hackett Publ'g Co. 1999) (1797) ("One calls the mere agreement or disagreement of an action with the law, without regard to the motive of the action, legality; but, when the Idea of duty arising from the law is at the same time the motive of the action, then the agreement is called the morality of the action.")).

[64] Fried, *supra* note 54.

theory itself.

The promise principle is the moral basis of contract law; it "is that principle by which persons may impose on themselves obligations where none existed before."[65] At the most basic level, this is why contracts should be enforced. Specifically, this is why breach of contract claims should be allowed to proceed, regardless of a debtor's failure to disclose such a claim in a bankruptcy proceeding. Prior to any bankruptcy, two parties imposed on themselves obligations where none existed before, and it is incumbent on the law to enforce these moral and legal promises.

Similar to the logic of not allowing a regretting promisor out of his obligations, "[t]he intuitive reason for holding fast is that such repentance should be the promisor's own responsibility, not one he can shift onto others."[66] The promisor still bears responsibility for his obligation, regardless of externalities such as a debtor not listing a breach of contract claim. "[H]olding people to their obligations is a way of taking them seriously and thus of giving the concept of sincerity itself serious content."[67]

For example, in *In re USinternetworking, Inc.*, the reorganized debtor (an Internet services company) knew of its breach of contract claim against a customer but failed to disclose this claim in its bankruptcy case before its reorganization plan was confirmed because of a company policy concerning accounting reports.[68] The customer asserted judicial estoppel as an affirmative defense against the claims and prevailed.[69] Among other claims, the debtor arguably had a claim for unfair dealings in the contract formation stage and a very large wrongful termination of contract claim.[70] If the doctrine of judicial estoppel had not barred the contract claims, then the

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[65] FRIED, *supra* note 1, at 1.

[66] *Id.* at 20.

[67] *Id.*

[68] USinterworking, Inc. v. Gen. Growth Mgmt., Inc. (*In re* USinternetworking, Inc.), 310 B.R. 274 (Bankr. D. Md. 2004).

[69] *Id.* at 286.

[70] *Id.* at 277.

customer may have been forced to uphold its promise, or at a minimum, compensate the debtor through a damage award for its failure to honor the contract as promised. The customer still had contractual obligations for which it bore responsibility—nothing had changed with respect to the contract and its promises therein. In applying the promissory principle to this situation, the court could have given the contract its legal and moral force.

A. The Promissory Principle Over Other Principles

The courts' decisions, whether to apply judicial estoppel or to permit the prosecution of undisclosed breach of contract claims, require choosing one principle (or set of principles) over another. As Fried indicated, "nothing about the promise principle . . . entails that all disputes between people who have tried but failed to make a contract or who have broken a contract must be decided solely according to that principle."[71] Accordingly, why decide to bar the undisclosed claim or not bar the undisclosed claim for breach of contract under the promissory principle? Why not decide the matter under the doctrine of judicial estoppel or possibly another doctrine?

Deciding whether to permit the litigation of an unlisted breach of contract claim strengthens the legal institution of contract by assuring moral and legal force to voluntary, sincere, autonomous relationships. The courts' decisions (explicit or implicit) to not make the determination under the promissory principle are often based upon a concern for protecting the integrity of the judicial process, the resources of the judiciary, and those who may detrimentally rely upon the debtor's disclosures, and for protecting against windfalls to debtors who may otherwise have "unclean hands." As demonstrated below, these concerns can be resolved, thus paving the way for decision-making in congruence with the promissory principle.

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[71] FRIED, *supra* note 1, at 27.

1. Protecting the Judicial System and the Debtor's Unclean Hands

Courts' application of judicial estoppel is typically understood as protecting the judicial process by preventing a party from "playing fast and loose" with the courts to suit the party's own purposes.[72] As applied here, the doctrine seeks to prevent debtor parties from omitting a breach of contract claim and then later trying to contradict their sworn statements by filing lawsuits to pursue said omitted breach of contract claims.[73] The primary purpose of this doctrine is not to protect litigants but rather the integrity of the judicial process.[74]

The debtor who seeks to later pursue an unlisted breach of contract claim may have omitted the claim for a variety of reasons including the following: a lack of understanding of what needed to be listed,[75] an uncertainty about the validity of the claim itself,[76] and acting in bad faith with the bankruptcy court.[77] While party opponents may not want to admit such, a lack of understanding of what needs to be listed or an uncertainty about a claim may be "forgivable" with respect to unlisted claims. However, it is the debtor who is clearly playing "fast and loose" with the court system and its participants that stretches the application of the promissory principle.

Protecting the integrity of the judicial process and addressing a debtor's unclean hands do not have to be achieved by implementing judicial estoppel. Accomplishing both the

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[72] *See* Ergo Science, Inc. v. Martin, 73 F.3d 595, 598 (5th Cir. 1996); Stewart v. Hardie, 978 S.W.2d 203, 208 (Tex. App. 1998).

[73] *See also* Brandon v. Interfirst Corp., 858 F.2d 266, 268 (5th Cir. 1998); *Stewart*, 978 S.W.2d at 208.

[74] *See Brandon*, 858 F.2d at 268; *Stewart*, 978 S.W.2d at 208.

[75] Cohen *ex rel.* Engelbrecht v. Arlington Heavy Hauling, Inc. (*In re* Engelbrecht), 368 B.R. 898 (Bankr. M.D. Fla. 2007).

[76] *See* Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp., 337 F.3d 314 (3d Cir. 2003); Dallas Sales Co. v. Carlisle Silver Co., 134 S.W.3d 928 (Tex. App. 2004).

[77] *See* Ortlieb v. Hudson Bank, 312 F. Supp. 2d 705 (E.D. Pa. 2004), *aff'd sub nom.* Estate of Ortlieb v. Hudson United Bank, 2005 U.S. App. LEXIS 5175 (3d Cir. 2005); *In re* Roundabout Theatre Co., 131 B.R. 14 (S.D.N.Y. 1991).

protection of the integrity of the judicial process and sanctioning a dishonest debtor may be achieved in several ways, depending on the phase of bankruptcy or post-bankruptcy in which the parties find themselves. For example, the courts may re-open the bankruptcy, revoke the discharge, or modify a reorganization plan post-confirmation.[78] When a bankruptcy court cannot modify a confirmed Chapter 11 plan pursuant to its general equitable powers or other obstacles impede a resolution via "re-working" the bankruptcy, the court may utilize its sanctioning powers.[79] Thus, the court no longer has to choose which principle should prevail—protection of the judicial process or the protection of contract.

For example, in *Glover v. Bank of New York*, debtor/property owner's breach of contract action against the bank, alleging the bank had improperly charged her for taxes and fees, was barred by the doctrine of judicial estoppel.[80] The debtor had failed to list the claim in her bankruptcy proceedings and had likely gained the delay of foreclosure proceedings as a result.[81] This case is unquestionably an example of a debtor playing "fast and loose" with the judicial system. The temptation would undoubtedly be to choose to apply the judicial estoppel doctrine, as the *Glover* court did, and be done with this debtor. However, the court could have chosen to protect the integrity of the judicial system *and* uphold the contract as promise by allowing the debtor to pursue the breach of contract claim while awarding any monies recovered from the bank to the creditors through the court's equitable and sanctioning powers. Thus, selecting one principle over another in this instance would no longer be an issue.

The notion of alternative resolutions to protecting the contract-as-promise principle *and* to protecting the integrity of the judicial system is neither outrageous nor incongruous. In

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[78] *See* 11 U.S.C. § 105(a) (2000); § 1127; Lampl v. Smith, 169 B.R. 432, 433 (D. Colo. 1994).

[79] *See* FED. R. CIV. P. 11; FED. R. BANKR. P. 9011; *In re* Rickel & Associates, Inc., 260 B.R. 673, 678-79 (Bankr. S.D.N.Y. 2001).

[80] Glover v. Bank of New York, 147 P.3d 336, 340 (Or. App. 2006).

[81] *Id.*

fact, certain jurisdictions reject the doctrine of judicial estoppel entirely, concluding the adoption of the doctrine would be "'out of harmony with the great weight of authority independent of the rule,' and that public policy can be vindicated 'more practicably and fairly' through other means."[82]

Finally, a note about protecting the judiciary with respect to its judicial resources and finality: while it may be that allowing such claims prolongs the use of judicial resources and extends concerns for finality, the contract claims are not without statute of limitations. Thus, the judicial system has already established protections of this nature for itself. By both upholding contracts *and* by establishing a system that does not permit debtors with unclean hands to merely escape "free" for failing to disclose breach of contract claims, contract as promise and the judicial process are bolstered. Contracting parties know that their promises will be taken seriously as voluntary, autonomous promises with moral and legal force, and debtors will know that while unlisted breach of contract claims will be permitted to proceed, sanctions may impact the distribution of damages.[83]

2. Detrimental Reliance

Given the fact that the doctrine of judicial estoppel is intended to protect the judicial system instead of litigants, jurisdictions that utilize the doctrine of judicial estoppel generally do not require that a party rely upon the statement or omission to its detriment before applying the doctrine.[84]

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[82] *Lampl*, 169 B.R. at 434 (citing United States v. 49.01 Acres of Land, More or Less, 802 F.2d 387, 390 (10th Cir. 1986)).

[83] *See* Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1288 (11th Cir. 2002) ("[a]llowing [the debtor] to back-up, re-open the bankruptcy case, and amend his bankruptcy filings, only after his omission has been challenged by an adversary, suggests that a debtor should consider disclosing potential assets only if he is caught concealing them.").

[84] *See* Eastover Bank for Savings v. Smith (*In re* Little), 126 B.R. 861, 868 (Bankr. N.D. Miss. 1991) ("We are also mindful of the equitable concept of judicial estoppel. This doctrine, distinct from that of equitable estoppel, applies to preclude a party from assuming a position in a legal proceeding inconsistent with one previously asserted. Judicial estoppel looks to the connection between the litigant and the judicial system

Nonetheless, in the context of bankruptcy proceedings, the party who breached the contract may also be a creditor who participates in the debtor's bankruptcy. Consequently, regardless of whether the reliance factor is necessary to the court's determination of whether to utilize judicial estoppel, the alleged breaching party/creditor may rely on the debtor's claim for breach omission in its negotiations of the debtor's financial matters within the bankruptcy proceedings. Given this common situation, why should the promissory principle trump the creditor's understandable and expected reliance on the claim's omission?

According to the Fried/Kantian account of contractual right, "the promisee's entitlement to the promisor's performance" tells us that the promisee is entitled "to compensation for the loss of the value of the performance."[85] Certainly the creditor may rely on the debtor's lack of disclosure of the claim in negotiating reduced compensation, a release, new contract, or other similar result within the bankruptcy, but it cannot be denied that the promisor/creditor breached the contract and the promissee/debtor is entitled to the performance or the value of the performance. The promisor/creditor is aware of its breach, has unclean hands, and can hardly contend that it is caught flat-footed. Thus, given this knowledge, the promissory principle should prevail.

The debtors/farmers in *In re Little* negotiated a new financing agreement with their bank in bankruptcy proceedings and then filed breach of contract claims against the bank after the conclusion of the bankruptcy.[86] The debtors never listed the breach of contract claim against the bank or disputed the bank's claim in the bankruptcy estate either.[87] The court in *Little* applied the doctrine of judicial estoppel and denied the debtors

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while equitable estoppel focuses on the relationship between the parties to the prior litigation.") (quoting Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 419 (3d Cir. 1988))).

[85] Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies,* 78 CHI.-KENT L. REV. 55, 75 (2003). *See also* Kochan, *supra* note 60.

[86] *Little*, 126 B.R. at 861.

[87] *Id.* at 866.

the opportunity to pursue the claims against the bank.[88] The court could have chosen to allow the debtors to proceed with its claim against the bank, evaluate whether post-confirmation modification was an option, and if it was not, consider the availability of sanctions as mentioned above when distributing any award. Accordingly, the institution of contract would not have to yield to the judicial system, but integrity could still be achieved.[89] As explained by Fried,

> [A] person who can claim the benefit of the promissory principle will often enjoy a great advantage, while a person who forfeits that benefit may be remitted to much less advantageous principles of remedy. The shift from one principle to another may make a large difference in the result. That should not be surprising, since by promising, people seek to make major shifts.[90]

Given the promise of the contract and its moral and legal force, the shift should not be unexpected to the promisor/creditor, giving way to the promissory principle as the prevailing principle.

B. The Effects of Giving Contracts Legal and Moral Force in Post-Bankruptcy Proceedings

1. Discourage Breach

Many scholars have written about discouraging breach and have proposed solutions in which to discourage breach.[91] While I leave the primary discourse to others before me, I note that permitting the prosecution of breach of contract claims not listed in bankruptcy filings may discourage breaches. Under the

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[88] *Id.* at 868.

[89] *See also Oneida*, 848 F.2d 414.

[90] FRIED, *supra* note 1, at 112-13.

[91] *See* Catherine Paskoff Chang, *Two Wrongs Can Make Two Rights: Why Courts Should Allow Tortious Recovery for Intentional Concealment of Contract Breach*, 39 COLUM. J.L. & SOC. PROBS. 47, 49 (2005); David Baumer, *Willful Breach of Contract for the Sale of Goods: Can the Bane of Business be an Economic Bonanza?* 65 TEMP. L. REV. 159 (1992).

promissory principle, breaching a contract is not a morally neutral act and discouraging breaches, even so-called efficient breaches, supports the "underlying, unifying structure,"[92] of contract law.[93] Enforcing contracts and the promises they contain strengthens the legal institution of contract and promotes efficiency: "[m]orality too is a human enterprise, and its special case, promising, underwrites human cooperation in furthering human goods, but on terms of equality, trust, and mutual respect."[94] When contract and promise *converge*, they "establish[] rules for formalizing trust" and "rules that help to enable a flourishing system of economic cooperation for mutual advantage."[95] In allowing unlisted breach of contract claims to proceed, in upholding these converging rules of contract and promise, and giving moral and legal force to the contract, breach may be discouraged.[96]

2. Give the Debtor an Opportunity to Repay Creditors

The contracting parties potentially impacted by allowing unlisted breach of contract claims to proceed are not just the debtor and the party the debtor is seeking to sue. Within the bankruptcy scheme as a whole there are frequently multiple contracts at issue. Putting aside the statutory details momentarily, if the debtor is permitted to pursue the undisclosed breach of contract claim and prevails, then the debtor may be able to compensate those creditors (the debtor's other contracting partners) for those breaches. In such a system the concept of autonomy, which lies behind contract as promise, would be bolstered and not rendered meaningless.[97] Thus,

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[92] FRIED, *supra* note 1, at i.

[93] *But see* Freeman & Mills, Inc. v. Belcher Oil Co., 11 Cal. 4th 85, 106 (Cal. 1995) (explaining "the intentional breach of contract has come to be viewed as a morally neutral act").

[94] Fried, *supra* note 54.

[95] Shiffrin, *supra* note 61, at 711.

[96] *See generally* George G. Triantis, *The Effects of Insolvency and Bankruptcy on Contract Performance and Adjustment*, 43 U. TORONTO L.J. 679, 710 (1993) (discussing how the treatment of breaches within bankruptcy affects the "cooperative behaviour between solvent parties in the non-bankruptcy world").

[97] FRIED, *supra* note 1, at 71 n.36.

multiple parties would enjoy the benefits and bear the responsibilities of personal choices while reinforcing the underlying structure of the legal institution of contract.[98]

While not explicitly relying upon the contract-as-promise theory in their decisions, certain courts have already reasoned through the importance of giving effect to the autonomous decisions to contract. In *Lampl v. Smith*, a Chapter 7 debtor claimed that her former lover breached his agreement to sell certain property the debtor had conveyed to the lover and split the proceeds.[99] The court in *Lampl* ruled that the debtor was not judicially estopped from pursuing these claims despite her failure to list the claim in her original bankruptcy schedules.[100] The court permitted the debtor to revoke the discharge and to reopen the case.[101] By allowing the debtor to pursue her claim for breach, it was anticipated that a large damage award from the lover to the debtor would be distributed for the benefit of the debtor's creditors.[102] The court's decision in *Lampl* not only gave the debtor the chance to insist that the contract with the lover be upheld through performance or damages, but it paved the way to give moral, equitable, and legal force and effect to the contract promises between the debtor and her creditors.

Contrary to *Lampl*, the court in *In re Pryor* ruled that judicial estoppel did preclude a Chapter 7 debtor from continuing her prepetition cause of action against her insurer for breach of contract as a consequence of failure to disclose said claim during bankruptcy proceedings.[103] The *Pryor* court made its ruling with the clear understanding that had such a claim been permitted to go forward, *all* of the creditors' claims against the debtor in bankruptcy could have been fulfilled.[104] Application of the contract-as-promise theory in the *Pryor* case would have given full force to the debtor's contract with her

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[98] *Id.*

[99] Lampl v. Smith, 169 B.R. 432, 433 (Bankr. D. Colo. 1994).

[100] *Id.* at 435.

[101] *Id.*

[102] *Id.* at 433.

[103] Pryor v. Deberry (*In re* Pryor), 341 B.R. 571 (Bankr. N.D. Miss. 2006).

[104] *Id.* at 576.

insurance company and the debtor's contracts with her creditors. In an ironic twist, the insurance company is able to extinguish its obligations and responsibilities as promisor and simultaneously prevent the insolvent debtor from fulfilling her promises. Stated differently, the court's decision to not hold the insurance company to its obligations was in a way not taking those obligations seriously and thus not giving serious content to the insurance company's sincerity of promise, a clear concern the contract-as-promise theory seeks to avoid.[105] Application of the contract-as-promise theory provides a balanced solution that addresses the interests of multiple parties, including creditors.[106] This solution seeks to "maximize the value of the estate efficiently while maintaining the protection of the sanctity of the oath and the integrity of the courts."[107]

3. The Practical Details

While this article is not intended to be a statutory roadmap, it must be acknowledged that the application of the promissory principle to the statutorily structured process of bankruptcy is not without implications. Replacing judicial estoppel with the contract-as-promise theory clearly contemplates reconsideration of the courts' application of doctrines which in turn affects the statutes that underlie the procedure. For example, a debtor who is able to pursue the breach of contract claim may have to turn the claim over to the bankruptcy estate for distribution, may have to relinquish control to the trustee and/or lose any damage awards through sanctions as proposed above with respect to debtors acting in bad faith.[108]

Again, the court should create a remedy that does not destroy the rights of creditors. For example, if necessary, under

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[105] FRIED, *supra* note 1, at 20. *See also* Jesse M. Fried, *Executory Contracts and Performance Decisions*, 46 DUKE L.J. 517 (1996) (addressing the related issue of whether *debtors* should be required to perform contracts).

[106] *See* Dugas, *supra* note 39, at 244.

[107] *Id.*

[108] Cusano v. Klein, 264 F.3d 936 (9th Cir. 2001); *see also* Riazuddin v. Schindler Elevator Corp. (*In re* Riazuddin), 363 B.R. 177 (10th Cir. 2007) (holding the trustee was permitted to pursue unlisted claims, even if the debtors were not so permitted).

11 U.S.C. § 350, the bankruptcy court may reopen a case. The court should prefer reopening to better serve the interests of unpaid creditors. Once the case is reopened, the court has multiple options for "directing the administration of the cause of action."[109] For instance, the court may permit joinder or substitution of the trustee pursuant to Federal Rules of Civil Procedure 17(a) or 25(c) regardless of the debtor's intent and avoid the intent inquiry entirely over which the circuits are presently split.[110]

Standing issues may also arise in the context of whether the debtor files the omitted claim before or after filing bankruptcy.[111] Yet, under Chapter 7, the estate retains all claims, disclosed or undisclosed,[112] and given the broad equitable powers with which the bankruptcy court is equipped, substitution of necessary parties would likely resolve such issues.[113] In the context of Chapter 11, the court may order a stay to permit the debtor to petition the bankruptcy court to reopen the case and to add the cause of action.[114] Additional issues arise in the context of a bankruptcy that may no longer be modified or in the allocation of additional monies if awards are received in the context of already settled creditors' claims.[115] As indicated above, the necessary procedures exist in part already and necessary modifications will not be cumbersome.[116] The greater challenge lies in encouraging the choice of the promissory principle over other principles and not in the final details of the principle's application. Significantly, application

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[109] *See* Dugas, *supra* note 39, at 246-55.

[110] *See* Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp., 337 F.3d 314 (3d Cir. 2003); *In re* Engelbrecht, 368 B.R. 898 (Bankr. M.D. Fla. 2007).

[111] *See* Dugas, *supra* note 39, at 245 (citing Parker v. Wendy's Int'l Inc., 365 F.3d 1268 (11th Cir. 2004)).

[112] *Id.* at 248-49.

[113] *See* cases cited *supra* note 25.

[114] *See* 11 U.S.C. § 1141(c) (2000); Diamond Z Trailer, Inc. v. JZ L.L.C. (*In re* JZ L.L.C.), 371 B.R. 412 (B.A.P. 9th Cir. 2007); *see generally* Dugas, supra note 39, at 249-54.

[115] § 105(a); § 1127; Lampl v. Smith, 169 B.R. 432, 433 (Bankr. D. Colo. 1994).

[116] *See* Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp., 337 F.3d 314 (3d Cir. 2003); *In re* Engelbrecht, 368 B.R. 898 (Bankr. M.D. Fla. 2007) (discussing generally the jurisdictional split concerning application of judicial estoppel).

of the promissory principle in permitting the prosecution of undisclosed breach of contract claims is emboldened by the well-settled rule that bankruptcy courts are courts of equity, empowered to invoke equitable principles to achieve fairness and justice.[117] The Code provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[118]

CONCLUSION

Contractual obligations are based upon promises that contracting parties freely and autonomously make. Entailed in the contract-as-promise theory is the commitment to perform the contract or pay damages to the promisee. A breaching party should not be allowed to breach a contract without repercussions for the simple reason that the injured party failed to list the future claim for breach during a bankruptcy proceeding. As demonstrated, protecting the integrity of the judicial system can be found in the distribution of damages and other mechanisms, and not in the denial of prosecution. Given the contract-as-promise principle and the legal and moral enforceability of promises, the bankruptcy courts' current practice of letting undisclosed breach of contract losses lie where they fall should be abandoned. "If somebody ended up losing because he trusted in the promise of another, why the more fool he! Contract law enforces promises and does not allow a disappointed party to bear his disappointment simply because it has fallen upon him."[119] By permitting the litigation of an undisclosed breach of contract claim, the institution of contract is given legal, moral, and equitable force.

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[117] *See* Momentum Mfg. Corp. v. Employee Creditors Comm. (*In re* Momentum Mfg. Corp.), 25 F.3d 1132, 1136 (2d Cir.1994); Nikoloutsos v. Nikoloutsos (*In re* Nikoloutsos), 199 F.3d 233, 236 (5th Cir. 2000).

[118] § 105(a).

[119] FRIED, *supra* note 1, at 65.

DO AS I DO, NOT AS I SAY: AN EMPIRICAL INVESTIGATION OF JUSTICE SCALIA'S ORDINARY MEANING METHOD OF STATUTORY INTERPRETATION

Miranda McGowan[*]

ABSTRACT

Justice Scalia is one of the only American judges to have created a complete methodology of statutory interpretation. Justice Scalia insists, "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." Any other interpretive approach, he claims, cannot be defended on rule of law principles. This article presents the results of a study that examined how Justice Scalia's practice of interpreting statutes compares with his description of that practice. This study produced three main findings based on a random sample of Justice Scalia's statutory interpretation dissents. First, Justice Scalia abandons textualism in about a quarter of the issues in the sample because he believes that the

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statute has given the courts common law authority. Second, when Justice Scalia does engage in textual analysis, more often than not he decides that the presumption in favor of ordinary meaning has been overcome. Furthermore, his textual analysis is informed by an eclectic set of extrinsic materials. With the singular exception of legislative history, he consults the kinds of extrinsic materials as other justices. Third, this study shows that Justice Scalia construes statutes in light of their evident purposes about as frequently as the Court as a whole. Because Justice Scalia refuses to consult legislative materials, however, his purpose analysis frequently stems from his own sense of a statute's purpose or of anomalous results—the least formal source of all.

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INTRODUCTION

Justice Scalia exhorts judges who interpret statutes to forget about what Congress or some members of Congress might have intended. Different members of Congress probably intended the law to mean different things, and some may have given the law no thought at all. "Statutory construction must" instead "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."[1] Any other method of statutory interpretation is lawless.

Just what does Justice Scalia mean by the "ordinary meaning" of statutory text? The idea originates with Justice Holmes's 1899 article *The Theory of Legal Interpretation*.[2] Speaking of the interpretation of contracts, Justice Holmes said,

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[1] Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004) (Scalia, J.) (quoting Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985)).

[2] *See* Chisom v. Roemer, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting) ("Our job begins with a text that Congress has passed and the President has signed. We are to read the words of that text as any ordinary Member of Congress would have read them, see Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899), and apply the meaning so determined.").

"[W]e ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used."[3] When judges interpret statutes, Holmes said, "We do not inquire what the legislature meant; we ask only what the statute means. . . . [I]f the same legislature that passed it should declare at a later date a statute to have a meaning which . . . the words did not bear, . . . the declaratory act would have no effect."[4]

Justice Scalia has translated Holmes's exhortation variously. In the quotation above, Justice Scalia seems to say one should first presume that statutory language means what an ordinary speaker of the English language would think it means. On another occasion, however, he said that "[w]e are to read the words of that text as any ordinary Member of Congress would have read them."[5] This is a different instruction. An ordinary member of Congress knows things about the statute and the legislative process that an ordinary speaker would not know, such as what mischief provoked Congress to act. The ordinary representative or senator may also use words differently than an ordinary speaker. He may give words a specialized meaning or borrow terms from the common law. Justice Scalia's focus on the ordinary congress member also embeds words' meanings at the time of the statute's passage—how the ordinary congress member *would have read* the words. The phrase "ordinary meaning" leaves the question of time open. On other occasions, Justice Scalia has suggested that judges should "look for a sort of 'objectified' intent—the intent that a *reasonable person* would gather from the text of the law, placed alongside the remainder of the *corpus juris*."[6] He has not explained how this articulation of his approach differs, if at all, from the first two.

These descriptions raise a number of questions: How often

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[3] Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417-18 (1899).

[4] *Id.* at 419-20.

[5] *Chisom*, 501 U.S. at 405 (Scalia, J., dissenting).

[6] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (1997) (emphasis added).

does the text of the statute decide an issue for Justice Scalia? How firm is his presumption in favor of ordinary meaning? In assessing that presumption, what if any extrinsic sources will he consult? Does Justice Scalia hold the line against purposive interpretation, or does statutory purpose influence his interpretations? If so, what does he use as evidence of statutory purpose?

This article describes the results of a study of Justice Scalia's statutory interpretation. Taking a random sample of Justice Scalia's dissents in statutory interpretation cases, this study investigated two broad questions. First, does Justice Scalia do as he says? Does he interpret a statute in accordance with the "ordinary meaning of the language in its textual context," departing from this ordinary meaning only when "some [other] permissible meaning" is clearly indicated?[7] To answer this question, I examined how often he applies the "ordinary" meaning of a term in comparison with other types of meaning, such as those derived from case law or the common law. I also investigated when and what canons he uses, what extrinsic sources he consults, and whether he does eschew legislative history. Finally, I looked to see when and if he considers a statute's purpose, and if so, what sources he relies on for evidence of statutory purpose.

Second, is Justice Scalia's practice different from what other Justices do? Here, I compared my results to two prior studies of the Court's interpretive practices—Nicolas Zeppos's study, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*,[8] and Jane Schacter's study of the Court's 1996 term, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation*.[9]

This article adds two things to prior studies of Justice Scalia's statutory interpretation. First, this study examines a

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[7] *Chisom*, 501 U.S. at 404 (Scalia, J., dissenting).

[8] Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073 (1992).

[9] Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1 (1998).

random selection of Justice Scalia's opinions in order to investigate what Justice Scalia does in the usual, rather than exceptional, case over the entire course of his career on the Supreme Court. Second, I take a broad perspective of Justice Scalia's methodology and examine many aspects of his decision making—not just his use of canons, his use of dictionaries,[10] or his use of legislative history.[11] I ask each of these questions and many others to try to develop a complete description of Justice Scalia's methodology.

My research shows more than the predictable inconsistency that happens when a pure theory encounters the messy world of practice. It reveals that Justice Scalia's actual practice closely resembles the Court's. His practice also resembles Legal Process methodology, which Justice Scalia has purported to reject.

Specifically, this paper presents three main findings. *First,* Justice Scalia entirely suspends textualism in about a quarter of the cases in the study's sample because he believes that he is interpreting a statute that has granted common law authority to the courts. Examples of such statutes are the Sherman Act[12] and the habeas corpus statute[13] that preceded the Antiterrorism and Effective Death Penalty Act (AEDPA).[14] Justice Scalia's willingness to suspend textualism when interpreting such statutes has been discussed elsewhere.[15] But, the fact that such

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[10] Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 315-30 (1998) (arguing that Justice Scalia's use of dictionaries is at odds with the goals of ordinary meaning textualism); Note, *Looking It Up: Dictionaries and Statutory Interpretation,* 107 HARV. L. REV. 1437, 1439 (1994) (comparing Justice Scalia's use of dictionaries with the Court's).

[11] *See* Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 257-59 (discussing Justice Scalia's unwillingness to consult legislative history but his willingness to engage in a kind of Gricean analysis of legislative intent); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351 (1994) (documenting Justice Scalia's success in persuading the court to rely less on legislative history and more on dictionaries and arguing that both trends have undermined the *Chevron* doctrine).

[12] 15 U.S.C. §§ 1-7 (2008).

[13] 28 U.S.C. § 2241 (2008).

[14] 28 U.S.C. § 2264 (2008).

[15] Daniel A. Farber & Brett H. McDonnell, *"Is There a Text in this Class?" The*

statutes comprise such a significant proportion of his statutory interpretation opinions is a new finding.

Second, Justice Scalia does not usually construe statutory language in light of its ordinary meaning. Justice Scalia follows the "ordinary" meaning only about a third of the time, even if "common law statutes" are excluded. About a fourth of the time, he construes a statute in light of other court cases. This is not to say that Justice Scalia follows controlling precedent as often as he applies the ordinary meaning of a word. That would be interesting but not noteworthy. Instead, when Justice Scalia encounters a word in a statute, if the Court has construed that word as it appears in a *different* statute, or if the court has construed the purpose of the statute he is construing, Justice Scalia will construe the statute in light of those holdings. He is also quite likely to apply the common law meaning of a term in a statute or a specialized meaning. When Justice Scalia does follow the ordinary meaning, he often does so without analysis. Occasionally, he just asserts the meaning of a word.

Third, this study shows that Justice Scalia usually interprets statutes in light of what he takes to be the statute's purpose. Indeed, he does so about as often as the Court as a whole does. In nearly three-quarters[16] of the issues in my sample, Justice Scalia considers and weighs the purpose of the statute or the consequences and incentives created by different interpretations. Justice Scalia's purposive propensity has been fairly constant over time as well; my findings do not uncover merely the mistakes of a newly minted Justice or the compromises of a mellower, senior Justice.

This paper will proceed as follows: Part I summarizes Justice Scalia's own descriptions of his theory and methodology of statutory interpretation. Part II.A describes this study's methodology in detail. Part II.B lays out this study's results—how Justice Scalia has interpreted statutes over the entire arc of his career. Part III considers some of the implications of this

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Conflict Between Textualism and Antitrust, 14 J. CONTEMP. LEGAL ISSUES 619, 620-21 (2005) (summarizing Justice Scalia's non-textual approach to interpreting antitrust statutes).

[16] Seventy-two percent, to be precise.

study's findings.

I. JUDGES ARE INTERPRETERS, NOT PARTNERS IN MAKING LAWS

A. Justice Scalia's Legal Process Roots

When Justice Antonin Scalia was a law student at Harvard Law School, Legal Process was near its zenith. He[17] heard Professor Henry M. Hart explain that law is "a purposive activity, a continuous striving to solve the basic problems of social living."[18] Professor Hart would have also cautioned that law—particularly statutory law, which takes the form of general and prospective directives—is inherently incomplete. It does not always clearly tell officials and citizens what to do with their specific problems.[19]

When law is unclear or incomplete, Professor Hart and his colleague and co-author, Professor Albert Sacks, believed that officials should fill gaps or resolve ambiguities through "reasoned elaboration."[20] By "reasoned elaboration" they did not mean that an official should construe a statute in light of her own policy preferences.[21] Rather, they meant that an official must "elaborate the arrangement [e.g., the statute, regulation, or precedent] in a way which is consistent with the other established applications of it" and in a way that "best serves the principles and policies it expresses."[22]

In their "Note on the Rudiments of Statutory Interpretation"[23] at the conclusion of their classic teaching

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[17] As did his colleagues, Justices Kennedy, Souter, Ginsburg, and Breyer. William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2047 (1994).

[18] HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 148 (William N. Eskridge, Jr. & Phillip P. Frickey, eds. 1994).

[19] *Id.* at 147.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* at 1374.

materials *The Legal Process*,[24] Professors Hart and Sacks specify that when construing a statute a court should "[d]ecide what purpose ought to be attributed to the statute and to . . . [the] subordinate provision"[25] in question. "Every statute must be conclusively presumed to be a purposive act." A law without a purpose "is foreign to the idea of law."[26] With that purpose in mind, the court should "interpret the words of the statute immediately in question so as to carry out the purpose as best it can."[27] The words of a statute guide and restrain interpretation in two ways. First, statutory text illuminates plausible statutory purposes. Second, it constrains the range of statutory interpretations. According to Hart and Sacks, the words of the statute must never be given "a meaning they will not bear" or a meaning that "would violate any established policy of clear statement," such as the rule of lenity or the rule of constitutional difficulties.[28]

Though Hart and Sacks permitted—and even counseled—interpreters to cast a wide net over materials that could illuminate a statute's context and purpose, they cautioned that all such evidence must be used properly.[29] "Properly" means, first, that a court recognize that the legislature—as the "chief policy-determining body" of our polity—is dependent on the good faith and good sense of courts and administrative agencies to effectuate *its* policies.[30] And, second, the point of contextual aids such as legislative history is *not* to help courts effectuate the intent of the legislature or of specific legislators.[31] Rather, their point is to shed light on the statute's "general purpose."[32]

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[24] When Justice Scalia was a student, THE LEGAL PROCESS was in mimeograph form, and it had just taken its more or less final form during 1958, his second year of law school. *See* Eskridge & Frickey, *supra* note 17, at 2045-46 (discussing how Hart and Sacks had intended to publish the 1958 draft sometime in 1959 or 1960).

[25] HART & SACKS, *supra* note 18, at 1374.

[26] *Id.* at 1124.

[27] *Id.* at 1374.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

Reasoned elaboration entrusts its practitioners with discretion.[33] Hart and Sacks believed that no method of statutory interpretation could wring all discretion from the task of statutory interpretation. Trying to do so would be counterproductive[34] because, in their view, discretion is a positive good, not a necessary evil.[35] Discretion "is the only means by which the intelligence and good will of a society can be" marshaled to solve otherwise "unsolved problems."[36] Courts, legislatures, and government agencies, in Hart and Sack's view, are all legitimate *partners* in lawmaking, each with some distinctive expertise to add to the enterprise.[37]

B. Justice Scalia Rejects Legal Process and Embraces Formalism

In his published writings, Justice Scalia agrees with Hart and Sacks on two important points. He believes, as they did, that courts must remember that the legislature is our primary policy-making body. In addition, he believes, as they did, that the goal of statutory interpretation is not to effectuate Congress's or legislators' actual *intentions*.[38] Thereafter, the core of his method of statutory interpretation and its objectives sharply diverge from that of his former professors.

First, his theory's objectives. They are simple. The rule of law is front and center. Justice Scalia developed his method of statutory interpretation to keep judges in their proper role. Judges, in his view, are not primarily subservient to the *lawmakers*. Rather, they are subservient to the *law* that the lawmakers promulgated. This conclusion follows from the rule of law because only bills passed by Congress and signed by the President have the force of law. As Chief Justice Taney wrote, and Justice Scalia quotes approvingly:

"[T]he judgment of the court cannot . . . be influenced by the

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[33] *Id.* at 158.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at 145-49, 166-67.

[38] SCALIA, *supra* note 6, at 29 (emphasis added).

> construction placed upon it by individual members of Congress . . . . The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself . . . ."[39]

Second, his methodology. Justice Scalia's description of his method puts the words of the statute, not the statute's purpose, at the fore of his method of statutory interpretation. He believes judges "*must* begin with the language employed by Congress and the assumption that the *ordinary* meaning of that language accurately expresses the legislative purpose."[40] This is not "the meaning [that] the words will bear"[41] but the "objective indication of the words."[42] That "objective indication . . . is what constitutes the law."[43]

Though he never invokes Hart and Sacks or their process of reasoned elaboration by name, they and it are his target. Justice Scalia believes his objective methodology can stop American judges from interpreting statutes as though they were elaborating common law principles.[44] Their tendency to do so is completely understandable—the "system of making law by judicial opinion . . . is what . . . every newborn American lawyer[] first sees when he opens his eyes."[45] The problem is that common law judges *make law* as surely bakers make bread, which the rule of law forbids them to do. Even putting the rule of law to one side, in a complex, modern democracy ruled by statutes and agency regulations "the Mr. Fix-it mentality of the common-law judge is a sure recipe for incompetence and usurpation."[46]

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[39] *Id.* at 30 (quoting Aldridge v. Williams, 44 U.S. 9, 24 (1845) (emphasis added by Justice Scalia)). This may be one of the only approving quotations of Chief Justice Taney in modern jurisprudence that was not meant to be ironic.

[40] Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004) (Scalia, J.) (quoting Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985)).

[41] HART & SACKS, *supra* note 18, at 1375.

[42] SCALIA, *supra* note 6, at 29.

[43] *Id.*

[44] *Id.* at 18.

[45] *Id.*

[46] *Id.* at 14.

When Justice Scalia speaks of a statute's "objective" meaning, he does not mean its literal meaning.[47] He insists—as did Hart and Sacks—that words have meaning only in context.[48] But the context to which Justice Scalia refers is much more circumscribed. Judges should:

> [F]irst, find the ordinary meaning of the language in its *textual* context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we apply that ordinary meaning.[49]

Words in a statute have a meaning in the context of the phrase in which they appear, and also within the context of the entire statute and United States Code.[50]

Another crucial part of a statute's context is that Congress wrote it.[51] Thus, Justice Scalia instructs judges to endeavor to discern what the words mean in the mouth of an ordinary

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[47] Indeed, Justice Scalia chides the Court for confusing textualism with literalism in *Smith v. United States*. *See* SCALIA, *supra* note 6, at 24 (citing Smith v. United States, 508 U.S. 223 (1993)). He accuses the majority of simplemindedly interpreting the word "used" literally when it held that someone who traded a gun for drugs "*used* a firearm during and in relation to a drug trafficking crime" under 18 U.S.C. § 924(c)(1). *Id.* at 24 (emphasis added). Literally, the defendant did "use" his gun as barter for drugs (and buying drugs was certainly a drug trafficking crime). A "proper textualist, [however] would surely have voted to acquit" (as Justice Scalia indeed had) because the phrase "'uses a gun' fairly connoted use of a gun for what guns are [usually] used for, that is, as a weapon." *Id.* Trading a gun was not using a gun because it was not used to threaten or harm anyone. Justice Scalia apparently thought much the same when he joined Justice Ginsburg's dissent in *Muscarello v. United States*, 524 U.S. 125 (1998). There, the Court held that an individual had "carried a firearm" when he had a gun locked in the trunk of his car during a drug sale. *Id.* at 126-27. Carry a gun, Justice Ginsburg wrote, meant "to pack a gun." *Id.* at 150 (Ginsburg, J., dissenting).

[48] HART & SACKS, *supra* note 18, at 1375.

[49] Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

[50] *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 3-4 (2001) (arguing that "the Court's 'textualists,'. . . give precedence to semantic context" and insisting that "judges must enforce the conventional meaning of a clear text, even if it does not appear to make perfect sense of the statute's overall policy").

[51] *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2396 (2003) (explaining that textualists "assert that language is intelligible [only] by virtue of a community's shared conventions for understanding words in context").

member of Congress, [52] while looking only at the statute in question, other statutes, the Constitution, and our common law.

This instruction is not license imaginatively to reconstruct the circumstances of the statute's passage with reference to the full panoply of legislative materials, formal policy pronouncements, and general public knowledge. Justice Scalia forbids judges from reviewing the legislative history of the statute at all. This ban is somewhat paradoxical given that he instructs judges to discern an "objectified intent" of Congress. The concept of an "objectified intent" could include reference to the legislative history, as those materials could certainly illuminate how a reasonable member of Congress understood the words of the statute. Indeed, original public meaning constitutional interpretation permits judges to consult the Federalist Papers and Madison's notes on the Constitutional Convention because these materials illuminate the original public meaning of the words of the Constitution.[53]

But for Justice Scalia, committee reports, hearings, and floor debates are forbidden fruit—off-limits to a judge committed to the rule of law. Justice Scalia frets (as did Hart and Sacks) that wily legislators, staffers, and lobbyists will manipulate the legislative history. Justice Scalia disagrees with Hart and Sacks that judges should, therefore, use legislative materials cautiously. Judges instead should shun these materials.

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[52] *See Chisom*, 501 U.S. at 405 (Scalia, J., dissenting).

[53] *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989) ("Properly done, [Originalism] requires the consideration of an enormous mass of material—in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states"). One could argue that it is permissible to consult external eighteenth-century sources to fill gaps in our knowledge about linguistic usage at that time. Though that is not in fact how the Court uses the Federalist Papers. *See* David McGowan, *Ethos in Law and History: Alexander Hamilton, the Federalist, and the Supreme Court*, 85 MINN. L. REV. 755, 835 (2000) (arguing that the Constitutional Originalists on the Court cite the Federalist Papers because of the significant "roles Hamilton and Madison played in writing the Constitution, getting it ratified, and bringing it to life" not to shed light on the Constitution's original semantic context). It is unrealistic to expect judges to know usages in every field of endeavor covered by statutes, however. This need for knowledge is likely present in each case, and one cannot consistently advocate the use of eighteenth-century sources while eschewing legislative history.

Legislators, staff members, and lobbyists have manipulated their contents precisely to deceive those judges naïve enough to consult them.[54] Even if these materials were accurate and reliable, judges should still ignore them because they cannot be used in a principled way.[55] No rules prescribe the weight "an element of legislative history is entitled to" or what trumps when evidence conflicts. This free-for-all means that legislative history can be used to justify a breathtaking "variety and specificity of result[s]"[56] "based upon the courts' policy preferences, rather than neutral principles of law."[57] Legislative history transforms the serious work of judging into a schmoozy cocktail party—"the trick is to look over the heads of the crowd and pick out your friends."[58]

Democratic governance and fairness also demand that citizens have notice of their obligations.[59] Interpretation according to legislative intent is "one step worse than the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not easily be read. Government by unexpressed intent is similarly tyrannical."[60] Judges should, therefore, endeavor to use methods and tools of interpretation that can be applied consistently to produce predictable results. "Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes. . . . Predictability, or as Llewellyn put it, 'reckonability,' is a needful characteristic of any law worthy of the name."[61] Reckonability is

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[54] *See* SCALIA, *supra* note 6, at 34 (arguing that "when it is universally known and expected that judges will [consult legislative history] . . . affecting the courts rather than informing the Congress has become the primary purpose of the exercise.").

[55] *Id. See also* Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("But not the least of the defects of legislative history is its indeterminacy. If one were to search for an interpretive technique that, on the whole, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history.").

[56] SCALIA, *supra* note 6, at 36.

[57] *Id.* at 35.

[58] *Id.* at 36.

[59] *Id.* at 17.

[60] *Id.*

[61] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

impossible without fidelity to a consistent methodology.[62]

Three main concerns, in sum, animate Justice Scalia's statutory interpretation methodology. First, judicial discretion is at odds with the rule of law. To the extent that it is a necessary evil, it should be limited to the fullest extent possible. Statutory interpretation must therefore be guided by a firm understanding of its objective and bound by a method. Justice Scalia claims that his textualism constrains judges' decisions more than other methods do, and it gives judges a principled method for interpreting statutes separate from their own "policy preferences."[63]

Second, statutory text lies at the heart of this method because it is the only thing that counts as law. As a default, a judge should assume that the words have their ordinary meaning. That default can be overcome; a judge's ultimate objective is to interpret a statute's text according to the objective indication of the words. Judges who do something else do not interpret *law*, and citizens cannot be legitimately bound by such decisions.

Third, the analogy he draws between Nero and legislative intent demonstrates his commitment to fair notice. Textualism gives citizens better notice of their obligations than interpretation according to legislative intent.

In short, formalism is not a basis for criticism. It is the point: "The rule of law is *about* form."[64] Formalism "makes a government a government of laws and not of men."[65] Formalism does not blind a judge to "the broader social purposes that a statue is designed, or could be designed, to serve" or to the fact

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[62] Dewsnup v. Timm, 502 U.S. 410, 435-36 (1992) (Scalia, J., dissenting) (strenuously criticizing the Court for deviating from the method of statutory construction it had adopted in a prior case and lamenting the unpredictability that the Court had injected into its bankruptcy jurisprudence).

[63] *See* SCALIA, *supra* note 6, at 17-18 ("[U]nder the guise or even the self-delusion of pursing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field.").

[64] *Id.* at 25.

[65] *Id.*

that "new times require new laws."[66] Rather, with eyes wide-open to the costs it entails, formalism denies that judges have "authority to pursue those broader purposes or write those new laws." [67]

This part has shown that Justice Scalia has claimed to have spurned his legal process roots and to have devised a statutory interpretation methodology that departs from the purposivism he learned from Hart and Sacks. The next part will show that he has not.

II. An Empirical Examination of Justice Scalia's Methodology in Statutory Interpretation Cases

This study attempts to determine how Justice Scalia's *practice* of interpreting statutes compares with his description of that practice. I analyzed a sample of forty-two randomly selected statutory interpretation dissents that Justice Scalia wrote between 1986 and 2006 to answer three main questions. First, how often does text of a statute resolve an issue of statutory interpretation for Justice Scalia? Second, how firm is his presumption in favor of ordinary meaning, and in assessing that presumption, what extrinsic sources does he consult? Third, does Justice Scalia hold the line against purposive interpretation, or does it often influence his decisions? If Justice Scalia engages in purpose analysis, what evidence of statutory purpose does he rely upon?

A. Methodology

This study sampled dissents for two reasons: they were likely to be as fully analyzed and argued as a majority opinion; and they offered Justice Scalia's unvarnished views of a statute's interpretation. I did not examine Justice Scalia's opinions for the Court out of a concern that he might compromise his methodology to hold together a majority. Dissents do not require such compromise. I did not sample his

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[66] *Id.* at 23.

[67] *Id.*

concurrences because they were often brief and did not fully analyze all the issues necessary to decide a case.

Dissents have their own drawbacks. Though fully argued, dissents often respond to arguments made by the majority. They could, therefore, refer to sources or evidence believed improper just to debunk the majority's claims about the strength of that evidence. Or, to lay the groundwork for a future reversal, a Justice might make arguments he considers methodologically improper to persuade a future court to rule differently.[68] Majority and concurring opinions, however, often respond to arguments made in other opinions, too. To the extent that dissents do this more frequently, careful coding could ameliorate this concern by noting when an argument or citation was in response to some argument made by the majority.

One other potential problem with using Justice Scalia's dissents to examine his usual interpretive practices deserves discussion. Perhaps cases that produce dissents are just harder than average. Focusing on dissents could skew the sample because a Justice might have to use methods or materials not necessary for easier cases. But, if cases with a dissent are harder cases, then hard cases seem to be the norm. Between the 1986 and 1990, 63% of the Supreme Court's opinions were not unanimous;[69] between 1995 and 1997, 59% were not unanimous.[70] Furthermore, Justice Scalia's methodology contains no exception for "hard" cases. Nor should it. Easy cases are easy because regardless whether a judge is a textualist, an intentionalist, or a purposivist she will reach the same conclusion. For formal methods like Justice Scalia's ordinary meaning textualism to have any bite, judges must hold fast to them in hard cases. Judging Justice Scalia's practice by examining his dissents, therefore, is entirely appropriate. In my final analysis, the real problems with Justice Scalia's opinions and concurrences outweighed whatever potential problems the

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[68] Thanks to my colleague Orly Lobel for pointing out these drawbacks.

[69] Thomas R. Hensley & Scott P. Johnson, *Unanimity on the Rehnquist Court*, 31 AKRON L. REV. 387, 388 (1998) (Table 1).

[70] Paul H. Edelman & Suzanna Sherry, *All or Nothing: Explaining the Size of Supreme Court Majorities*, 78 N. C. L. REV. 1225, 1249 (2000) (Appendix B).

dissents might have.

To create my sample, I searched LEXIS for all of the cases between 1986 (the year he joined the Supreme Court) and July 2006 in which Justice Scalia wrote a dissent.[71] My research assistant and I scanned through these cases looking for statutory interpretation cases, which I defined as those cases that required the Court to interpret a statute. I downloaded those cases for closer examination to find those in which Justice Scalia wrote an opinion that dissented from the majority on statutory grounds.[72] I excluded cases in which Justice Scalia would have decided the case on some other ground—such as standing, jurisdiction, or constitutionality, and I also excluded cases in which Justice Scalia simply stated that he was joining the dissent of some other Justice.

These searches produced a total of seventy-four cases. I alphabetized these cases by name and then selected every other case from the list for my sample.[73] I noted the term for each of the dissents and compared the number of dissents per term in my sample against the actual number of statutory interpretation dissents per term. My sample did not initially include cases from the 1988, 1993, 2000, 2001, or 2002 terms, so I chose additional cases to code from each of those terms, using the same random selection technique.[74]

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[71] My research assistant and I ran the following searches: dissentby (scalia) and date (geq (01/01/1986) and leq (9/30/1990)), dissentby (scalia) and date (geq (10/01/1990) and leq (10/31/1999)), dissentby (scalia) and date (geq (11/01/1999) and leq (06/14/2005)), dissentby (scalia) and date (geq (6/15/2005) and leq (07/01/2006)). I ran several rather than one large search because I was not sure how many statutory interpretation decisions Justice Scalia had dissented from. Once I realized it was likely to be a manageable number, I determined to include dissents from Justice Scalia's entire tenure.

[72] If an opinion both concurred and dissented in part, I included it in the dissent sample, but I coded it as a "concurrence/dissent."

[73] While I was coding the dissents, I discovered a few cases that had been included mistakenly in the sample. In my first cull, these cases had appeared to be decided on statutory interpretation grounds but on closer inspection they were not. I excluded those cases from the study.

[74] In 1988, 1993, and 2001, Justice Scalia dissented twice, and in 2000, he dissented three times. I selected one case each from 1988, 1993, 2001, and 2002 and two from 2000. I also discovered that some Court terms were "overrepresented" in my sample—1987 (five sampled out of a total of six), 1990 (three sampled out of four), 1992 and 1994

I personally read and completed a coding form for each of the cases in this sample. (A blank coding form appears in Appendix B.) While coding, I discovered that in two dissents in my sample, Justice Scalia dissented on something other than statutory grounds, and I removed these cases from the sample. In total, I coded forty-two cases. In some of the dissents, Justice Scalia's decision turned on the interpretation of more than one statute or more than one statutory section. For these dissents, I filled out a coding sheet for each statute or section of a statute that Justice Scalia interpreted. My research assistant entered the information from these sheets into a FileMaker Pro7 database. In total, forty-two cases[75] produced forty-seven separate statutory interpretation issues and separate case records in my database.

As Appendix B shows, the coding sheets recorded a wide variety of information about each dissent—the statute and phrase at issue, whether Justice Scalia described his statutory interpretation methodology, the type of "meaning" he appeared to apply, the precedents he cited, whether he interpreted the statute according to its purpose and what he relied upon for evidence of that purpose, other statutes he cited, the secondary sources he cited, and the canons he applied. If it was a statute the court had traditionally interpreted in a common law fashion—for example, the Sherman Act and the old habeas corpus statute—that fact was noted as well. I also coded information about whether the case presented an issue of agency deference and the standard of deference Justice Scalia applied, whether Justice Scalia consulted the legislative history and if so what kind, what assumptions he made about the drafting Congress, whether he invoked the law's reader or drafter, and whether he invoked "common sense" as support for his interpretation. I also included a catch-all field for other notes about the dissent. In that field I could note whether an

(two dissents each term and both were in the sample), 2003 (four sampled out of five). The 1989 term was underrepresented—one dissent was in my sample, though Scalia dissented six times that term. I did not correct for these over- and under-representations.

[75] *See* Appendix A for a list of the cases.

argument or a citation was made only in response to the majority opinion.

In order to assess the strength of Justice Scalia's presumption in favor of "ordinary meaning" I coded the "meaning" applied to resolve each issue of statutory interpretation. There were initially ten possible types: "ordinary meaning," "natural meaning," "specialized meaning," "plain language," "plain meaning," "plain statement," "common law," "precedent," "can't know" (for cases where Justice Scalia did not state and where I could not infer the type of meaning Justice Scalia was searching for or applying), and a catch-all category, "other." After the coding was completed, I collapsed some categories: "plain meaning" and "plain language" (because Justice Scalia used the terms interchangeably) and "other" and "can't tell."

More than one category of meaning could be selected for a given issue of interpretation. If Justice Scalia said that he was applying the ordinary meaning of a term, I coded it as "ordinary meaning"; the same went for "plain language" or "plain meaning," "natural meaning," and "common law." If he said that he was applying a specialized meaning or defined a term using a legal dictionary or treatise, I coded it as "specialized." If he said that prior case law had defined a term or construed a statute, I coded it as "case law." And if he applied a plain statement canon, I coded it as "plain statement." For example, often a specialized meaning comes from the common law. If that was the case, that issue was coded as both "common law" and "specialized" meaning.

"Plain meaning" and "ordinary meaning" were coded separately because traditionally plain meaning has implied literal interpretation of a statute.[76] Justice Burger's finding in *TVA v. Hill* that the Endangered Species Act blocked the Tellico Dam project is a famous example of such literalism.[77] Justice

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[76] *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 741-42 (3d ed. 2001) (describing the plain meaning approach of the Burger Court as literalism and contrasting Justice Scalia's New Textualism).

[77] TVA v. Hill, 437 U.S. 153 (1978).

Scalia has distanced himself from "literalism."[78] He rarely describes his method as "plain meaning." [79] Instead, he consistently speaks of "ordinary meaning."

My results confirm that when Justice Scalia says plain meaning, he refers to something different than "ordinary meaning." "Plain meaning" usually refers to a specialized but accepted meaning of a term, while "ordinary meaning" refers to the common usage of a term.[80] Justice Scalia never cites to a general dictionary when he is construing a statute in light of its "plain meaning." In contrast, when he construes statutes in light of their ordinary meaning, he cites to general dictionaries about 20% of the time. Furthermore, in a quarter of the plain meaning cases Justice Scalia believed that the plain meaning was a specialized meaning, while the "ordinary meaning" of a statute was also a "specialized" meaning in fewer than one-tenth of the issues.

A wide variety of legal issues comprised my sample (as illustrated in Appendix A). No one substantive area dominated. There were nine issues of administrative law (which included any case in which there was an agency interpretation), five each of criminal law and civil procedure, four each of civil rights and antitrust, and three of bankruptcy. Traditional habeas and habeas appeals under the Antiterrorism and Effective Death

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[78] *See supra* note 51 and accompanying text (describing Justice Scalia's insistence that he is not a literalist).

[79] I have found only one reference to "plain meaning" in his scholarly writings. *See* Scalia, *supra* note 65, at 1184 ("[I]t is perhaps easier for me than it is for some judges to develop general rules, because I am more inclined to adhere closely to the plain meaning of a text").

[80] *See Key Tronic Corp. v. United States* for an illustration of this point. 511 U.S. 809 (1994), *aff'g* in part, *rev'g* in part, 984 F.2d 1025 (9th Cir. 1993). In that case, he dissented because he disagreed with the Court's conclusion that construing CERCLA to permit prevailing private plaintiffs to recover the litigation "stretch[ed] the *plain* terms of the phrase 'enforcement activities' too far." 511 U.S. at 823 (Scalia, J., dissenting) (emphasis supplied). "*[U]sually*," he conceded, the term "enforcement" refers to a government prosecution. *Id.* at 824 (emphasis added). But, he insisted, "enforcement" also "clearly includes the assertion of a valid private claim against another private litigant." *Id.* "Lawyers," he reasoned, "regularly speak of 'enforceable obligations' and 'enforceable contracts,' and of 'enforcing' a private judgment." *Id.* In other words, if "enforcement" were construed according to its ordinary meaning, the Court was right, but the plain meaning of the terms supported Justice Scalia's interpretation.

Penalty Act (AEDPA) also appeared, as did issues of discrimination, labor and employment law, and international trade.

This next part will describe what the data revealed about my three main questions: how often the text of a statute resolves questions of statutory interpretation for Justice Scalia; how firm his presumption in favor of ordinary meaning is; and whether Justice Scalia resists the urge to interpret statutes in light of their apparent purposes.

B. When Interpreting "Common Law" Statutes, Justice Scalia Abandons Textualism

The Court has construed some federal statutes as delegations of common law authority to the courts. Such statutes include the Sherman Act, the old habeas corpus statute prior to AEDPA, Section 1983, and some civil procedure issues. In the area of antitrust, Professors Farber and McDonnell have documented that Justice Scalia takes such a common law, non-textual approach, too.[81]

This study confirms Justice Scalia's non-textual, common law tendencies in antitrust and documents that these tendencies extend even further.[82] Twenty-five percent of the dissents in my sample involved common law statutes. In them, Justice Scalia abandons textualism. Case law, not ordinary meaning, is his lodestar in interpreting these statutes. He never refers to "ordinary" meaning in his discussion of any of the "common law" statutes in my sample. He also eschews textual canons in interpreting common law statutes (*see* Chart 1), while commonly applying them to construe regular statutes—two-thirds of his dissents involving regular statutes cite textual integrity canons,

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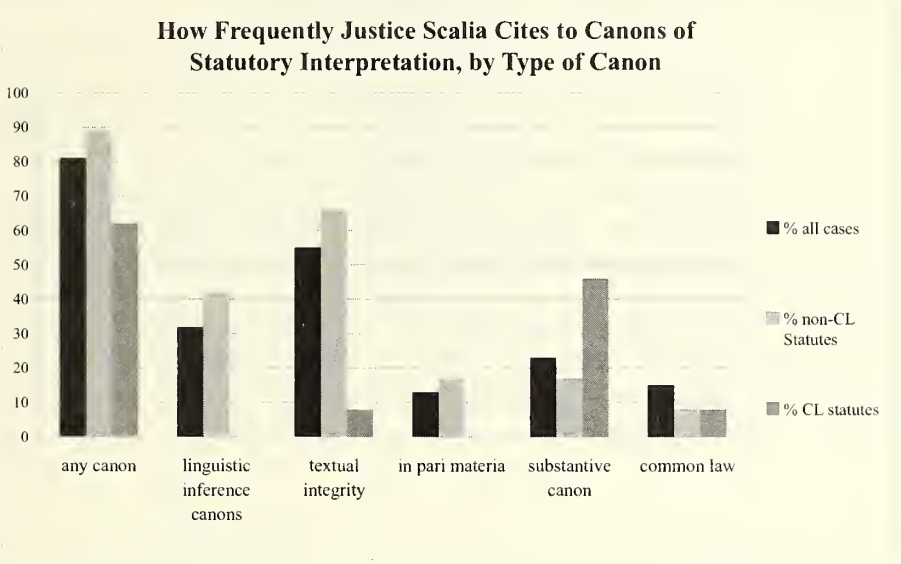
[81] Farber & McDonnell, *supra* note 15, at 620-21 (summarizing Justice Scalia's non-textual approach to interpreting antitrust statutes).

[82] *See, e.g.*, Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 732 (1988), *aff'g* 780 F. 2d 1212 (5th Cir. 1986) (Scalia, J., dissenting); Stutson v. United States, 516 U.S. 163, 178 (1996), *granting cert., vacating* 36 F.3d 94 (11th Cir. 1994) (Scalia, J., dissenting) (arguing that the "facially unlimited statutory text" of 28 U.S.C. § 2106 "is subject to the implicit limitations imposed by traditional practice and by the nature of the appellate system created by the Constitution and laws of the United States").

and 40% cite linguistic inference canons. He is far more likely to use substantive canons to interpret common law statutes. About half of the time in common law cases he relies on substantive canons, while he only uses such canons to construe 17% of regular statutes.[83]

Chart 1



[83] In the sample as a whole, he applied a substantive canon to resolve 22% of the issues.

Justice Scalia also uses different types of extrinsic sources when he interprets common law statutes. (See Chart 2). In about half of the issues in my sample, Justice Scalia relies on some non-legal secondary source. He cites to dictionaries only when he is interpreting regular statutes; he cites treatises and law review articles more frequently when he is interpreting common law statutes. Often, these sources provide the basis for his assertions about the statute's purpose or about the likely incentives or consequences a rule would create.

Justices on the Court do not always agree that a statute is a grant of common law authority; that issue is itself a matter of interpretation. Interestingly, twice in my sample, Justice Scalia believed that a statute should be interpreted as a grant of common law interpretive authority when the majority did not;[84] on another occasion, though he was interpreting the Sherman Act, he believed that the issue should be decided by the application of the presumption against the extraterritorial reach of American statutes to the statute's text.[85] The majority opinion did even not discuss the language of the Sherman Act that Scalia considered to be insufficiently specific.[86]

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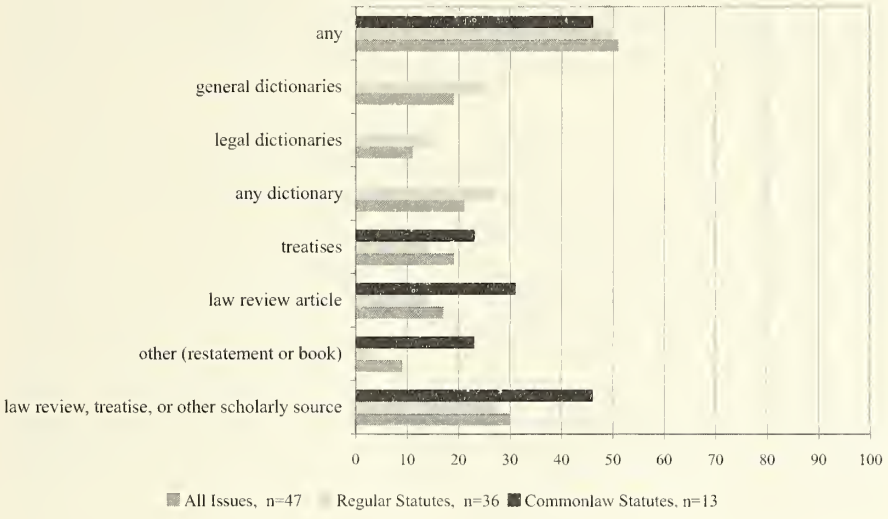
[84] Those cases were *Lawrence v. Chater*, 516 U.S. 163 (1996) (interpreting 28 U.S.C. § 2106, which governs the Court's power to grant certiorari, vacate the judgment below, and remand the case to a lower court to review their decisions in light of an administrative agency's reinterpretation of law) and *Olympic Airways v. Husain*, 540 U.S. 644, 646 (2004) (interpreting the term "accident" in Article 17 of the Warsaw Convention).

[85] Hartford Fire Ins. Co. v. California, 509 U.S. 764, 814-15 (1993) (Scalia, J., dissenting).

[86] *Id.* at 797-98.

Chart 2

How Frequently Justice Scalia Cites to Extrinisc Sources, by Type of Source



Because Justice Scalia has a general practice of treating common law statutes differently than other statutes, I will sometimes exclude issues involving such statutes from my sample as I report the rest of my results. I will refer to these kinds of statutes as "common law statutes," and to ones that the Court does not believe grant it such authority as "regular statutes."

C. Justice Scalia Construes Statutes' Meaning Eclectically; No Dominant Type or Source of Meaning Emerges in the Data

How often does Justice Scalia construe a statute to accord with its ordinary meaning? He instructs that statutory interpretation should "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."[87] When would an ordinary member of Congress or a reasonable person believe that a specialized meaning or a common law meaning should apply?[88]

1. In Most Cases, Justice Scalia's Presumption of Ordinary Meaning Is Overcome

If Justice Scalia indeed "begin[s] with . . . the assumption that the ordinary meaning" of the language applies,[89] then that presumption is usually overcome. Seventy-two percent of the time Justice Scalia applies something besides the "ordinary" meaning.[90] Excluding common law statutes, that figure drops

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[87] Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004) (Scalia, J., dissenting).

[88] Chisom v. Roemer, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting) ("We are to read the words of that text as any ordinary Member of Congress would have read them").

[89] *Engine Mfrs. Ass'n*, 541 U.S. at 252 (Scalia, J., dissenting) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.").

[90] The ordinary meaning cases in my sample were: Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (interpreting the Detainee Treatment Act of 2005); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (interpreting the Communications Act of 1934); Johnson v. United States, 529 U.S. 694 (2000) (interpreting the Sentencing Reform Act of 1984, 18 U.S.C. § 3583); Clinton v. City of New York, 524 U.S. 417 (1998)

only a bit—to 64%.

What sort of meaning does Justice Scalia assign to statutory language if not the ordinary meaning? Case law supplies the meaning of a term about a third of the time;[91] he finds words to have specialized, legal meanings in 20% of my sample and a plain meaning[92] in 19%. Case law or legal authorities frequently supply the "plain" meaning of terms.

When interpreting regular statutes, Justice Scalia does apply the ordinary meaning somewhat more frequently (37%) than in the sample as a whole (28%). But he still frequently relies on case law (23%) and specialized meanings (25%) when interpreting regular statutes. He applies the plain meaning about 20% of the time, and nearly as frequently draws the meaning from the common law (17%).[93]

(interpreting the Line Item Veto Act, 2 U.S.C. § 692); Smith v. United States, 508 U.S. 223 (1993) (interpreting 18 U.S.C. § 924(c)(1), which prohibits using a gun in connection with a drug trafficking crime); Key Tronic Corp. v. United States, 511 U.S. 809 (1994) (interpreting the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607); Peretz v. United States, 501 U.S. 923 (1991) (interpreting 28 U.S.C. § 636(b)(3) of the Federal Magistrates Act); Chisom v. Roemer, 501 U.S. 380 (1991) (interpreting 42 U.S.C. § 1973, § 2 of the Voting Rights Act); Pauley v. BethEnergy Mines, Inc., 501 U.S. 680 (1991) (interpreting 30 U.S.C. § 902(f)(2) of the Black Lung Benefits Act); Bowen v. Massachusetts, 487 U.S. 879 (1988) (interpreting 5 U.S.C. § 704 of the Administrative Procedure Act); U.S. Dep't of Justice v. Julian, 486 U.S. 1 (1988); Houston v. Lack, 487 U.S. 266 (1988); K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988) (interpreting the Tariff Act of 1930, 19 U.S.C. § 1526).

[91] As Section II.C.3 will explain in greater detail, "case law" usually does not refer to controlling precedent. Instead, it refers to cases that interpret other statutes or cases that explain statutory purpose.

[92] Key Tronic Corp. v. United States, 511 U.S. 809, 822 (1994) (interpreting the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607); Rasul v. Bush, 542 U.S. 466, 495-96 (2004) (interpreting 28 U.S.C. § 2241 (habeas corpus)); Barnhart v. Peabody Coal Co., 537 U.S. 149, 175 (2003) (interpreting the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9706(a)); United States v. Johnson, 481 U.S. 681, 693 (1987) (interpreting the Federal Tort Claims Act, 28 U.S.C. § 1346); Hohn v. United States, 524 U.S. 236, 254 (1998) (interpreting the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 1254(1)); Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 607, 612 (1987) (interpreting the Coastal Zone Management Act, 16 U.S.C. § 1451 and the National Forest Management Act of 1976, 16 U.S.C. § 1600 and the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701); Dewsnup v. Timm, 502 U.S. 410, 422-23 (1992) (interpreting 11 U.S.C. § 506(d)); Hamdan v. Rumsfeld, 548 U.S. 557, 655-56 (2006) (interpreting the Detainee Treatment Act, § 1005(e)(1), 119 Stat. 2742 (2005)).

[93] These figures do not sum to 100 because more than one category of meaning could

These findings can be squared with Justice Scalia's own description of his methodology. In his view, a judge's task is to determine the objective meaning of the statute—that which a "reasonable person would gather from the text of the law" when it is read in light of "the remainder of the *corpus juris*." [94] To do this, judges should "first, find the ordinary meaning of the language in its *textual* context," and presume that that meaning accurately expresses Congress's purpose.[95] Next, judges should apply "established canons of construction, [and] ask whether there is any clear indication that some permissible meaning other than the ordinary one applies."[96] The cases in which Justice Scalia construes statutory text in light of its common law or specialized legal meaning seem consistent with these instructions. In my sample, he frequently asserts that when Congress borrows a legal term of art or uses a term with an established common law meaning, Congress intended to import that meaning to the statute.[97] Similarly, Justice Scalia's "whole code" and "whole act" canons could also explain why he follows case law interpreting similar words in other statutes. He presumes that when Congress uses the same or similar words in *different* statutes it intends for those phrases to have a consistent meaning. Indeed, the data bear this explanation

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be selected.

[94] SCALIA, *supra* note 6, at 17.

[95] *Chisom*, 501 U.S. at 404 (Scalia, J. dissenting) (emphasis added).

[96] *Id.*

[97] *See, e.g.*, United States v. Aguilar, 515 U.S. 593, 616 (1995) (Scalia, J., dissenting) ("Statutory language need not be colloquial, however, and the term 'corruptly' . . . has a longstanding and well-accepted meaning."); Moskal v. United States, 498 U.S. 103, 121, 126 (1990) (Scalia, J., dissenting) (explaining that "I think it plain that 'falsely made' had a well-established common-law meaning at the time the relevant language of § 2314 was enacted[,]" and "when a statute employs a term with a specialized legal meaning relevant to the matter at hand, that meaning governs."); Bowen v. Massachusetts, 487 U.S. 879, 915 (1988) (Scalia, J., dissenting) (asserting that "the words 'money damages' [were not intended to] have any meaning other than the ordinary understanding of the term as used in the common law for centuries . . . and that § 702 [of the Administrative Procedures Act] encompasses 'the time-honored distinction between damages and specific relief'") (first brackets in original); *Id.* at 925 (Scalia, J., dissenting) (arguing that "the phrase 'adequate remedy' . . . has an established, centuries-old, common-law meaning in the context of specific relief-to wit, that specific relief will be denied when damages are available and are sufficient to make the plaintiff whole.").

out—most of the cases in which Justice Scalia interpreted a statute in light of prior case law, he also applied the whole act canon, whole code canon, or *in pari materia*.[98]

If this is right, then Justice Scalia's presumption in favor of ordinary meaning does little work. A presumption that is overcome more than two-thirds of the time is not much of a presumption. The advantages of this presumption are its formality, ease of application, and predictability,[99] all of which should reduce judicial discretion. But this presumption is riddled with exceptions—the ordinary meaning applies, unless it is a common law statute, or unless Congress has borrowed the word from the common law, or unless the word has been used in a different statute. Some of these exceptions Justice Scalia has never acknowledged, which certainly diminish the certainty he can claim for his method. Furthermore, as the next section will show, the ordinary meaning cases do not form any discernable pattern, which also reduces the "reckonability"[100] of Justice Scalia's decisions.

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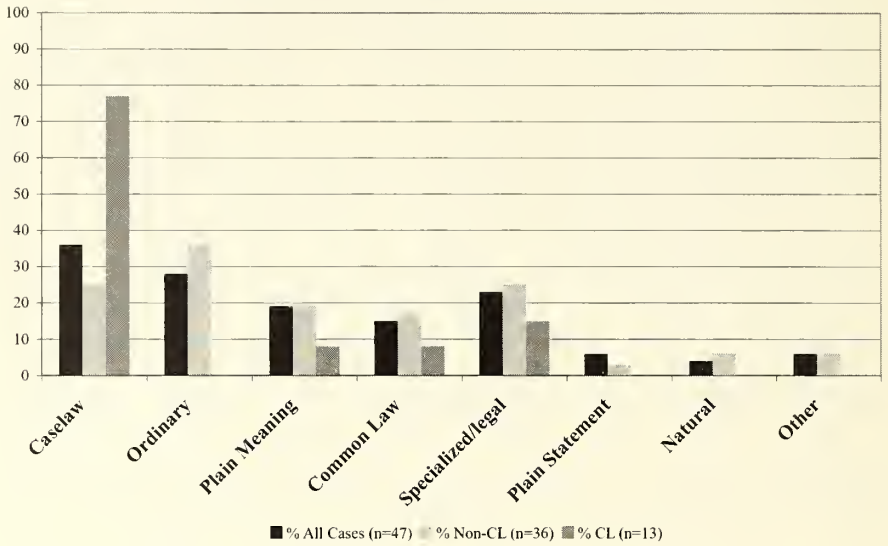
[98] *See, e.g.*, Day v. McDonough, 547 U.S. 198, 213 (2006) (Scalia, J., dissenting) (interpreting the limitations period in AEDPA to be waivable as the limitations in the former habeas corpus statute had been); Hohn v. United States, 524 U.S. 236, 255 (1998) (Scalia, J., dissenting) (interpreting the phrase "case[s] in courts of appeals" in AEDPA in light of the court's interpretation of the prior habeas corpus statute); U.S. Dep't of Justice v. Julian, 486 U.S. 1, 15 (1988) (Scalia, J., dissenting) (interpreting Freedom of Information Act, 5 U.S.C § 552, in light of the restrictions on access to presentence reports provided by Rule 32(c)(3)(E) of the Federal Rules of Criminal Procedure, and the 1976 Parole Act).

[99] *See supra* text accompanying notes 65-67 (discussing that the goals of Justice Scalia's interpretive methodology are to provide notice, predictability, and to reduce judicial discretion).

[100] Scalia, *supra* note 65, at 1178.

Chart 3

Types of Meaning that Justice Scalia Applies



2. A Closer Look at Justice Scalia's "Ordinary Meaning" Method

Justice Scalia's ordinary meaning cases represent many different areas of the law: whether detainees at Guantanamo Bay can bring habeas corpus actions, the permissibility of federal magistrate's duties, the sentencing guidelines, filing deadlines for habeas actions, the Communications Act of 1934, the Line Item Veto Act, criminal law, administrative law, environmental law, voting rights, federal court jurisdiction, international trade, and Medicaid.

About a quarter (23%) involved agency interpretations,[101] all of which Justice Scalia rejected as unreasonable.[102] Perhaps Justice Scalia thinks that if a statute has an ordinary meaning, other interpretations at odds with that meaning are necessarily unreasonable. My sample is too small to draw that conclusion firmly, and in my sample, he only defers to agency interpretations 22% of the time.

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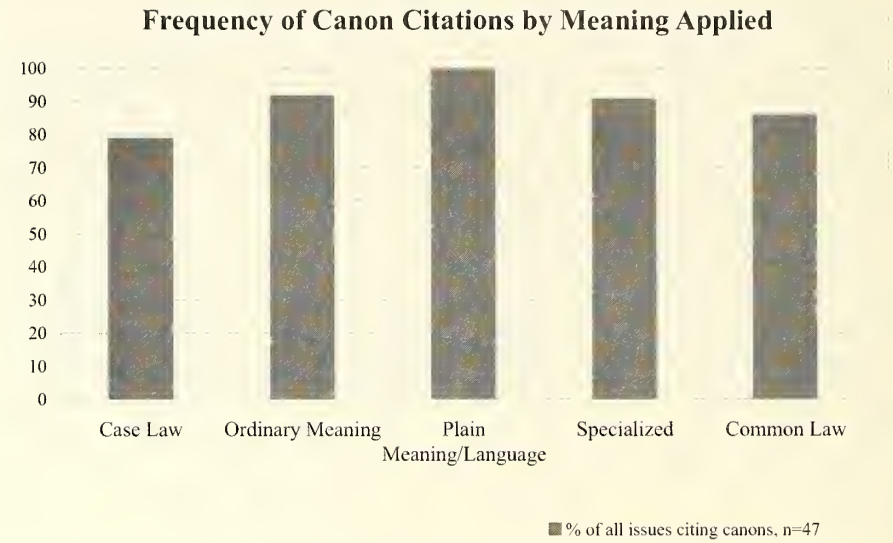
[101] That proportion is comparable to the proportion of agency cases in the sample as a whole (19%).

[102] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1004-05 (2005); Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 707 (1991); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 321 (1988).

Chart 4


Frequency of Canon Citations by Meaning Applied
100
90
80
70
60
50
40
30
20
10
0
Case Law
Ordinary Meaning
Plain Meaning/Language
Specialized
Common Law
% of all issues citing canons, n=47

Canons are a regular feature of these ordinary meaning cases. Justice Scalia cites to them in 92% of the "ordinary" meaning issues in my sample. Most often,[103] these are canons of linguistic inference.[104] In contrast, he uses linguistic canons in only a quarter of the plain meaning cases that cite any canons at all. This finding squares with Justice Scalia's own statements about canon usage: he says that linguistic inference canons like expressio unius only apply if the statutory language is ambiguous.[105]

Justice Scalia cites secondary sources (which includes dictionaries) to support his ordinary meaning interpretation less frequently (38% of the time) than he does in the sample as a whole (51%). The data also suggest that he is less likely to cite to law review articles, treatises, and other scholarly works when he is applying the ordinary meaning than he does in the sample as a whole.

One pattern I expected to see did not pan out. I had expected that criminal laws, which regulate the conduct of all citizens and pose the most serious rule of law issues, would be an area in which Justice Scalia would hew most closely to his ordinary meaning methodology. My sample included five substantive criminal law cases: *Almendarez-Torres v. United States*,[106] *Moskal v. United States*,[107] *Smith v. United States*,[108] *United States v. O'Hagan*,[109] and *United States v. Aguilar*.[110]

But only in one of these five criminal cases—*Smith v. United States*—did Justice Scalia apply the ordinary meaning. In that case Justice Scalia argued that the majority wrested the

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[103] Forty percent of the time.

[104] Here, I followed Professors Eskridge's and Frickey's typology of canons. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 97-108 (1994) (providing a list of canons of interpretation followed by the Rehnquist Court).

[105] Key Tronic Corp. v. United States, 511 U.S. 809, 823 (1994) (Scalia, J., dissenting).

[106] 523 U.S. 224 (1998).

[107] 498 U.S. 103 (1990).

[108] 508 U.S. 223 (1993).

[109] 521 U.S. 642 (1997).

[110] 515 U.S. 593 (1995).

word "use" out of its statutory context when it held that a defendant who traded a gun for drugs "use[d] a firearm" in connection with a drug crime.[111] Common words like "use" are "inordinately sensitive to context," he said.[112] In *this* context the phrase "uses a firearm" could only mean to use the gun as a weapon.[113]

More commonly in these criminal cases, Justice Scalia argued that a term had a *specialized* legal meaning. He argued in *Aguilar* that the phrase "corruptly . . . endeavors to influence . . . the due administration of justice" should be construed *generously* as the Court had when interpreting the successor statute.[114] He quoted a 1921 case, *United States* v. *Russell*, which had held that the use of the word "endeavor" "got rid of the technicalities which might be urged as besetting the word 'attempt,' and it describes *any effort or essay* to do or accomplish the evil purpose that the section was enacted to prevent."[115]

Indeed, in *Moskal v. United States* he castigated the Court for applying the ordinary meaning of the term "falsely made" and finding automobile titles with false odometer readings were "falsely made, forged, altered, or counterfeited securities" under 18 U.S.C. § 2314.[116] "Falsely made" had a specialized meaning under the common law, he argued, and that meaning was "forged."[117] Though the titles falsely reported the car's mileage, they were the car's real—not forged—titles. The Court must in such cases apply that specialized meaning—"when a statute employs a term with a specialized legal meaning relevant to the matter at hand, that meaning governs."[118] That is the rule

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[111] *Smith*, 508 U.S. at 245 (Scalia, J., dissenting).

[112] *Id.*

[113] *Id.* at 245-46, 242-43.

[114] *Aguilar*, 515 U.S. at 610 (Scalia, J., dissenting) (citing 18 U.S.C. § 1503).

[115] United States v. Russell, 255 U.S. 138, 143 (1921) (emphasis added).

[116] In Justice Scalia's view, the Court's opinion piled on one error after another—after using the wrong methodology, the Court proceeded to get the ordinary meaning of "falsely made" wrong too. Moskal v. United States, 498 U.S. 103, 119-20 (1990) (Scalia, J., dissenting).

[117] *Id.* at 122.

[118] *Id.* at 121.

because when "Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts . . . [that] 'cluster of ideas.'"[119]

And in the other two criminal cases, he applied a substantive canon to interpret the statute. In *Almendarez-Torres v. United States*, Mr. Almendarez-Torres had illegally reentered the United States after he had been convicted of an aggravated felony.[120] Because of that conviction, he could be sentenced to twenty years in prison instead of two under 8 U.S.C. § 1326(b)(2).[121] The Court held that section 1326(b)(2) merely provided a sentence enhancement to the crime of illegal reentry, which meant that the prosecution had to prove certain facts by the preponderance of evidence.[122]

Justice Scalia disagreed. The statutory text could reasonably be read to establish separate crimes, and the canon to avoid constitutional difficulties required that construction: "That it is genuinely doubtful whether the Constitution permits a judge (rather than a jury) to determine by a mere preponderance of the evidence (rather than beyond a reasonable doubt) a fact that increases the maximum penalty to which a criminal defendant is subject is clear enough from our prior cases."[123]

The rule of lenity resolved *United States v. O'Hagan*[124] for Justice Scalia. There the Court held that insider trading by an attorney who got the information during his representation of a client amounted to the use of a deceptive device "in connection with the purchase or sale of" a "security" in violation of section 10(b) of the Securities Act of 1934.[125] Justice Scalia appeared willing to interpret section 10(b) as a "common law" statute, but

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[119] *Id.* (quoting Justice Jackson in Morissette v. United States, 342 U.S. 246, 263 (1952)) (internal quotations added).

[120] *Almendarez-Torres*, 523 U.S. at 227.

[121] *Id.* at 226.

[122] *Id.* at 235.

[123] *Id.* at 251.

[124] *O'Hagan*, 521 U.S. 642 (interpreting 15 U.S.C. § 78j(b)).

[125] *Id.* at 653.

he found the Court's (and the Securities and Exchange Commission's) interpretation too far-fetched to satisfy the rule of lenity.[126]

3. Justice Scalia Frequently Interprets Statutes in Light of Non-Controlling Case Law

Justice Scalia follows case law that interpreted the same statute or a similar statute when interpreting statutes about a third of the time in my sample.[127] About thirty percent of these issues involved statutes that the court has traditionally interpreted in a common law fashion—habeas corpus, the Sherman Act, and 42 U.S.C. § 1983. That Justice Scalia follows case law in common law cases is not terribly surprising and confirms his own acknowledged practice. Indeed, when Justice Scalia is interpreting "common law" statutes, he relies on case law 77% of the time.[128]

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[126] *Id.* at 679 (Scalia, J., dissenting) ("While the Court's explanation of the scope of § 10(b) and Rule 10b-5 would be entirely reasonable in some other context, it does not seem to accord with the principle of lenity we apply to criminal statutes.").

[127] The cases in which Justice Scalia follows case law are: Day v. McDonough, 547 U.S. 198 (2006) (interpreting 28 U.S.C. § 2244 of the Antiterrorism and Effective Death Penalty Act); Olympian Airways v. Husain, 540 U.S. 644 (2004) (interpreting Article 17 of the Warsaw Convention); Rasul v. Bush, 542 U.S. 466 (2004) (interpreting 28 U.S.C. § 2241, the habeas corpus statute); PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001) (interpreting the Americans with Disabilities Act); United States v. Mead Corp., 533 U.S. 218 (2001) (interpreting the Administrative Procedures Act, 5 U.S.C. § 706); Jefferson County v. Acker, 527 U.S. 423 (1999) (interpreting 28 U.S.C. § 1442, which deals with removal of actions to federal court brought against officials for actions committed under color of official duty); Hohn v. United States, 524 U.S. 236 (1998) (interpreting 28 U.S.C. § 1254, the habeas corpus statute); Richardson v. McKnight, 521 U.S. 399 (1997) (interpreting 42 U.S.C. § 1983); Lawrence v. Chater, 516 U.S. 163 (1996) (interpreting 28 U.S.C. § 2106); Key Tronic Corp. v. United States, 511 U.S. 809 (1994) (interpreting CERCLA, 42 U.S.C. § 9607); Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) (interpreting 28 U.S.C. § 1331 and the Sherman Act, 15 U.S.C. § 1) (coded twice because interpreted two different statutes each involving distinct issues); INS v. Doherty, 502 U.S. 314 (1992) (interpreting 8 U.S.C. §§ 1158 and 1253 of the Immigration and Nationality Act); Ferens v. John Deere Co., 494 U.S. 516 (1990) (interpreting 28 U.S.C. § 1404, forum non conveniens); Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991) (interpreting the Sherman Act, 15 U.S.C. § 1); U.S. Dep't of Justice v. Julian, 486 U.S. 1 (1988) (interpreting the Freedom of Information Act, 5 U.S.C. § 552).

[128] Occasionally members of the court disagree whether a statute indeed *does* grant "common law" interpretive authority to the Court. *See, e.g.*, Lawrence v. Chater, 516 U.S. 163 (1996).

But if we limit our search to regular statutes, we find that Justice Scalia still follows case law 23% of the time.[129] Interestingly, only one of these cases, *Hohn v. United States,*[130] involved what Justice Scalia thought was controlling precedent. That case addressed whether a habeas petitioner's petition for a certificate of appealability was a "case in courts of appeals" under section 102 of AEDPA.[131] Justice Scalia argued that the Court's prior interpretation of the appealability of the refusal to grant a certificate of probable cause under the prior habeas statute "squarely and explicitly endorsed" his interpretation of this section of AEDPA.[132]

In every other case, Justice Scalia interpreted statutory language with reference to non-binding precedent. In fact, on one occasion, in *United States Department of Justice v. Julian*, he relied on *lower* court interpretations of the same statute as support for his interpretation.[133] More often, the case law he relies upon has interpreted the same or similar word in a different statute, and Justice Scalia assumes that when words

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[129] In his sample of majority opinions in statutory interpretation cases between 1890 and 1990, Professor Zeppos found that the Court cited judicial decisions in 93% of the cases. Zeppos, *supra* note 8, at 1093. It might be tempting to conclude that Justice Scalia's practice varies greatly from the Court's practice as a whole. I hesitate to draw that conclusion, however. My sample is composed of Justice Scalia's dissents, and I cannot rule out that one of the reasons why he dissents in these cases is that there are not prior Court decisions that bear on the statute's interpretation. I also coded references to case law somewhat differently than Zeppos. I analyzed whether Justice Scalia *followed* the meaning given by case law, while Zeppos counted all citations to case law.

[130] 524 U.S. 236 (1998).

[131] *Id.* at 239.

[132] *Id.* at 261.

[133] *See* U.S. Dep't of Justice v. Julian, 486 U.S. 1, 18 (1987) (discussed *infra* p. 48 and notes 181-83 and accompanying text). He argued that "inter-agency memoranda" should not be interpreted literally to mean only memos from one agency to another. *Id.* at 19 n.1. Rather, the term should also be read to encompass reports from one governmental unit to another, such as pre-sentence reports from probation officers to courts. *Id.* Many lower courts, he said, had adopted this less literal meaning and held that the term encompassed "information furnished by Senators to the Attorney General concerning judicial nominations . . . and reports prepared by outside consultants." *Id.* (citation omitted) (citing Ryan v. U.S. Dep't of Justice, 617 F.2d 781, 789-91 (1980) and Gov't Land Bank v. GSA, 671 F.2d 663, 665 (1st Cir. 1982)).

are used in different statutes they mean the same thing.[134]

Other times case law provided authority for the application of an interpretive canon. For example, Justice Scalia used precedent in *Key Tronic Corp. v. United States* to argue that "Congress need only be explicit . . ." when it shifts fees—"it need not incant the magic phrase . . . ."[135] He concluded that private litigants could recover attorney's fees for suits brought under CERCLA because the language "costs of response incurred by any other person" with "response" defined to include "enforcement activities" was plain enough to meet that burden.[136] Indeed, he argued, this interpretation tracked the Court's own usage—the Court had referred to private suits under the Clayton Act as "'vehicle[s] for private enforcement' of the law."[137]

Justice Scalia used case law similarly in *United States v. Aguilar*[138] to argue for an interpretive canon. In that case, he argued that the obstruction of justice statute should be read "generous[ly]" because the Court had held previously that the statute's use of the word endeavor "'describes *any effort or essay* to accomplish the evil purpose that the section was enacted to prevent.'"[139] The defendant in *Aguilar* was a district court judge who had lied to an FBI agent; the hitch in applying the obstruction of justice statute was that the FBI agent was not

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[134] *See* PGA Tour, Inc. v. Martin, 532 U.S. 661, 693 (2001) (Scalia, J., dissenting) (arguing that the Court's interpretation of "public accommodation" in other statutes would exclude contests like the PGA Tour); INS v. Doherty, 502 U.S. 314, 332 (1992) (Scalia, J., dissenting) (arguing that "the Attorney General's power to deny withholding" of deportation claims due to an alien's fear of persecution "differs significantly from his broader authority to administer discretionary forms of relief such as asylum and suspension of deportation"); Day v. McDonough, 547 U.S. 198, 213 (2006) (Scalia, J., dissenting) (arguing that under other statutes the Court had held that statutes of limitations defenses based on waiver were forfeited if they were not explicitly raised in the answer).

[135] Key Tronic Corp. v. United States, 511 U.S. 809, 823 (1994) (Scalia, J., dissenting).

[136] *Id.* at 821-22.

[137] *Id.* at 824 (brackets in original) (citing Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 109 (1986)).

[138] 515 U.S. 593 (1995).

[139] *Id.* at 610 (quoting United States v. Russell, 255 U.S. 138 (1921)).

acting on behalf of a grand jury and might not even testify before it.[140] Read "generously," however, Justice Scalia thought it clear that Judge Aguilar had "endeavor[ed] to influence obstruct, or impede . . . justice."[141] (Curiously, Justice Scalia makes no reference to the rule of lenity, which had been decisive in *O'Hagan*.)

What about Justice Scalia's use of canons when he is following case law? Justice Scalia cites canons in 55% of the common law cases in which he follows case law. With regard to regular statutes, he cites canons in all the cases in which he followed case law. This fact may seem odd at first glance—why cite canons if the statute's meaning is supplied by case law? Remember, however, that most often when he follows case law, it is *not* binding precedent; rather, he is arguing that the court should construe the statute at issue similarly to how it has construed other statutes. Canons help make his case that such a parallel construction is appropriate. Indeed, he cites "whole code" canons[142] more frequently when he applies the meaning supplied by case law than when he applies some other type of meaning.

4. Specialized and Common Law Meaning

A specialized legal meaning resolved about a fifth of the issues in my sample. If common law statutes are excluded, the proportion rises to just over a quarter. In these cases, Justice Scalia reverses his presumption that a statute should be construed in light of the "ordinary meaning" of its terms. For example, he says in *Moskal v. United States*, "when a statute employs a term with a specialized legal meaning relevant to the matter at hand, that meaning governs."[143] More than half of the time, the specialized meaning Justice Scalia applies comes from the common law.[144] Justice Scalia assumes that when

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[140] *Id.* at 597.

[141] 18 U.S.C. § 1503 (2000 & Supp. 2008).

[142] Here, I include "in pari materia" as a kind of whole code canon.

[143] Moskal, 498 U.S. at 121.

[144] PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001); Almendarez-Torres v. United States, 523 U.S. 224 (1998); Richardson v. McKnight, 521 U.S. 399 (1997); Babbitt v.

"Congress[145] borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts" that "cluster of ideas."[146] Eighty-nine percent of these cases cite secondary sources.

5. Justice Scalia Relies on Extra-Legal Sources As Frequently As the Court As a Whole

Justice Scalia draws on a wide range of extra-legal aids (dictionaries, legal treatises, law review articles, histories, and scholarly works) and relies on them to resolve about half of the issues in my sample. I found, as others have, that he often cites to dictionaries, and he did so in about 24% of the dissents in my sample.[147] Interestingly, in this sample Justice Scalia cites to dictionaries less frequently than the Court as a whole. In *Looking It Up: Dictionaries and Statutory Interpretation*,[148] the author found that 28% of the Supreme Court's published opinions in the 1992 term cited to dictionaries.[149] This figure

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Sweet Home Chapter of Cmtys. for a Great Or., 517 U.S. 687 (1995); Bowen v. Massachusetts, 487 U.S. 879 (1988). Bowen was coded twice because it involved two separate issues—the meaning of "money damages" and the meaning of "adequate remedy," both of which Justice Scalia argued should be resolved according to the meaning these terms had at common law. *Id.* at 913-14.

[145] Justice Scalia justifies this assumption as reflecting Congress's knowledge and Congress's practice. Because Justice Scalia refuses to consult legislative history, however, he cannot claim that he has any empirical basis for this assumption. He, therefore, can only mean that an idealized member of Congress (he would say "reasonable" or "ordinary" member of Congress) knows and adopts the specialized meaning when it employs terms of art. Whether we accept his terminology (reasonable) or mine (idealized) the point is the same: Justice Scalia's assumption about Congress's practice is *judicially* created. *Cf.* Part II.D.3 (explaining Justice Scalia's practice of imputing statutory purpose to Congress). Professor John Manning has conceded this point and that it means that textualists impute meaning to statutes. John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 84 (2006).

[146] *Moskal*, 498 U.S. at 121 (Scalia, J., dissenting) (quoting Morissette v. United States, 342 U.S. 246 (1952) (Jackson, J.)).

[147] To compute this figure, I again counted the number of *cases* (rather than issues) that cited to dictionaries to enable a comparison between my sample and other studies.

[148] Note, *supra* note 10, at 1438.

[149] That study's count of dictionary citations by the individual Justices lends support for the idea that Scalia does not cite to dictionaries more frequently than the Court. It found that Scalia cited to dictionaries in 11.27% of his opinions. Justice O'Connor cited to dictionaries nearly as frequently (9.68%). Justices Thomas and Souter were *more*

probably understates the proportion of statutory interpretation cases that cite dictionaries because it included all of the term's cases. Justices are more, not less, likely to use dictionaries to interpret statutes than to interpret the constitution.

Some might say that Justice Scalia's frequent use of extra-legal materials does not show much. A textualist might argue that judges may legitimately consult dictionaries because they illuminate the "public meaning" of statutes. It is also possible that textualism makes him less likely than other members of the court to cite to such sources. The data do not support these explanations, however.

First, Justice Scalia cites to extra-legal sources a bit more frequently than the Court does as a whole—even when dictionaries are backed out of the data. Professor (now Provost) Nicholas Zeppos's study found that 27.6% of the Court's majority opinions cited to extra-legal sources.[150] Justice Scalia cites to treatises, law review articles, restatements, and other scholarly works in 30%[151] of the cases in my sample.[152] That proportion drops only slightly to about 28% if we exclude common law cases in which Justice Scalia admits that he is not using textualist methods.[153] In other words, even when Justice Scalia claims to be using textualist methods, he is just as willing as the Court to rely on extra-legal sources. Textualism does not constrain Justice Scalia's interpretive practices in this regard.

Second, Justice Scalia is not merely mining legal scholarship or treatises to find the text's original public meaning. Instead, these sources support his arguments about statutory purpose and the incentives that a given interpretation

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likely to cite to dictionaries (22.22% and 15.52% respectively). Note, *supra* note 10, at 1439 n.14.

[150] Zeppos, *supra* note 8, at 1095. Professor Zeppos randomly sampled 413 majority opinions in statutory interpretation cases drawn from twenty different terms from 1890 to 1990. *Id.* at 1079.

[151] Professor Zeppos made no such distinction in his data.

[152] To compute this figure, I counted the number of *cases* (rather than issues) that cited to such materials so that I could draw comparisons between my sample and other studies.

[153] Professor Zeppos's data made no distinction between common law and regular statutes.

would create. He uses extrinsic sources just as other judges do.

6. Justice Scalia Does Not Rely on Legislative Materials, Though He Frequently Makes Assertions About Congress's Likely Intentions

In one respect, Justice Scalia does just what he says he does. He does not cite to the legislative history: he cited to such materials in fewer than 9% of the cases in my sample.[154] In three of these cases he cited the legislative history only to contradict the majority's reading of the legislative history. In his 1992 study of the Supreme Court's citations in statutory interpretation cases from 1890-1990, Professor Zeppos found that 32% of the Supreme Court cases in his sample cited to congressional reports, 16.9% to congressional debates, and 12.6% to congressional hearings.[155] Professor Jane Schacter reports that 46% of the opinions during the 1996 term cited to legislative history materials.[156] Justice Scalia's citation practice in this respect is starkly different from the Court's.

Although Justice Scalia does not consult legislative history, the next section will show that he thinks about the legislature a great deal. He frequently asserts what Congress's likely purpose or intent must have been. Justice Scalia often baldly asserts his hunches, however, in part because he refuses to cite legislative materials.

This finding is both ironic and troubling given his worries about judicial discretion. The next section will show that Justice Scalia also frequently weighs what Professor Zeppos called "[c]onsequentialist or practical considerations"[157] with no support for his conclusions. These are just the types of considerations one would expect to see in the legislative history.

This section has shown that Justice Scalia interprets statutes eclectically. The presumption of "ordinary meaning"

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[154] To compute this figure, I counted the number of cases (rather than issues) that cited to dictionaries to enable a comparison between my sample and other studies.

[155] Zeppos, *supra* note 8, at 1093.

[156] Schacter, *supra* note 9, at 18 (Table I).

[157] Zeppos, *supra* note 8, at 1097.

does little work for him. Common law, general legal meanings, and case law strongly influence his statutory interpretations. Treatises and legal scholarship do, too, and he cites to these sources at least as frequently as the Court does. This next section will show that Justice Scalia's practice resembles the Court's in another important way. His sense of a statute's purpose usually shapes his interpretation of that statute.

D. Justice Scalia Usually Construes Statutes in Light of His Sense of Their Purposes

> "To be a textualist in good standing, one need not be too dull to perceive the broader social purposes that a statue is designed, or could be designed, to serve . . . . One need only hold the belief that judges have no authority to pursue those broader purposes or write those new laws."[158]

Perhaps this study's most intriguing finding is how frequently Justice Scalia interprets statutes to carry out their likely purposes. In 72% of the issues in my sample, Justice Scalia interprets statutory language in light of statutory purpose. If common law statutes are excluded, nothing changes. Seventy-two percent of these issues still involve purpose analysis. Justice Scalia's tendency to engage in purpose analysis has also been fairly constant over time as well. Purpose analysis, in short, is a regular feature of his statutory interpretation practice.

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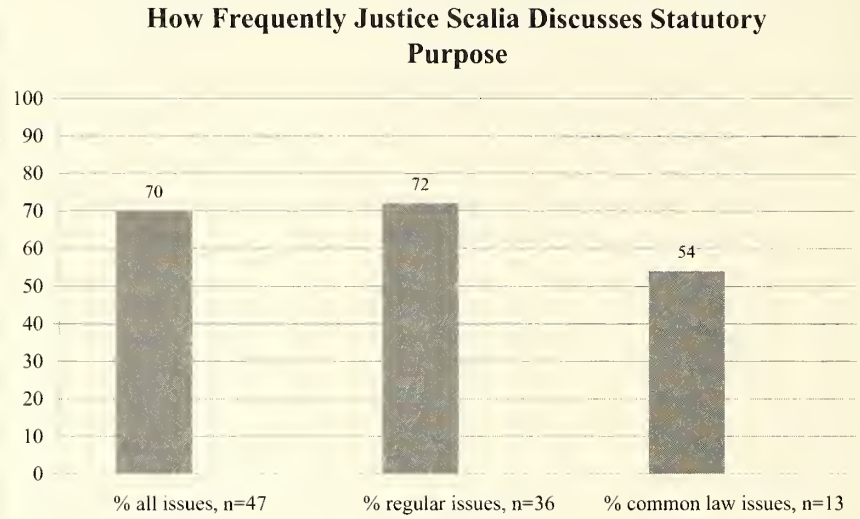
[158] SCALIA, *supra* note 6, at 23.

Chart 5


How Frequently Justice Scalia Discusses Statutory Purpose
100
90
80
70
60
50
40
30
20
10
0
70
72
54
% all issues, n=47
% regular issues, n=36
% common law issues, n=13

1. Justice Scalia Considers Statutory Purpose As Often As the Court

Justice Scalia considers purpose as often as the rest of the Court. In particular, he invokes what Professor Jane Schacter has called "judicially-selected policy norms" almost as frequently as the Court. According to Professor Schacter, during the 1996 term the Court invoked "judicially-selected policy norms" in 73% of its statutory interpretation opinions.[159] Judicially-selected policy norms are not arguments that "invoke[] a policy norm" that is "traced directly to Congress . . . (by, for example, calling the norm a statutory 'purpose')."[160] Rather, a judicially-selected policy norm is an assertion that a particular interpretation of a statute "should be rejected" because it "would undermine . . . values" not specified in the statute.[161] In Professor Schacter's view, these arguments have a "flavor of unabashed, Posnerian consequentialism."[162] In 70% of the issues in my sample, Justice Scalia argued that a particular interpretation should be rejected or adopted because of some judicially-selected policy norm—only slightly less frequently than the Court.

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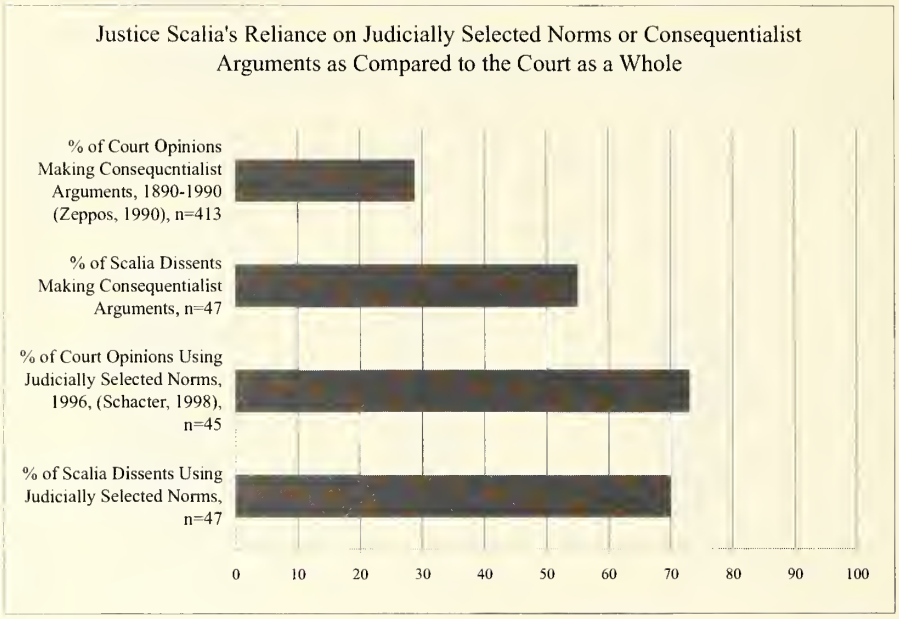
[159] Schacter, *supra* note 9, at 21.

[160] *Id.* at 21 n.65.

[161] *Id.*

[162] *Id.*

Chart 6


Justice Scalia's Reliance on Judicially Selected Norms or Consequentialist Arguments as Compared to the Court as a Whole
% of Court Opinions Making Consequcntialist Arguments, 1890-1990 (Zeppos, 1990), n=413
% of Scalia Dissents Making Consequentialist Arguments, n=47
% of Court Opinions Using Judicially Selected Norms, 1996, (Schacter, 1998), n=45
% of Scalia Dissents Using Judicially Selected Norms, n=47
0
10
20
30
40
50
60
70
80
90
100

Professor Zeppos's study of the Court's statutory interpretation opinions from 1890-1990 also investigated how frequently the Court made practical or consequentialist arguments without citing to authority. An opinion makes such an argument when it considers how an interpretation "would affect the actions, behaviors, or decisions of those affected by the application of the statute" but cites no authority for the claim.[163] Professor Zeppos found that 28.8% of the Court's statutory interpretation opinions made such arguments.[164]

In my sample of his dissents, Justice Scalia made such consequentialist arguments in about 55% of his dissents—nearly twice as frequently as the Court. What explains this finding? I suspect that Justice Scalia's refusal to cite to the legislative history is behind it. If an opinion made a consequentialist argument but cited some source like the legislative history, Professor Zeppos did not count it. Ironically, Justice Scalia's principled refusal to cite to legislative history makes him much more likely to make unsupported assertions. This unintended consequence undercuts his method's claim to reduce judicial discretion.

This study also dug further into Justice Scalia's consequentialist arguments and explored the specific kinds of arguments that he makes about purpose. This next section explains how Justice Scalia thought about the probable purposes of the statutes in my sample. In describing the kind of purposive analysis that Justice Scalia engages in, I will focus on the regular statutes. If Justice Scalia suspends textualism when he interprets "common law" statutes, in that context, purpose analysis is not necessarily at odds with his stated methodology. But in regular statutes, where Justice Scalia so ardently embraces textualism, purpose analysis is more surprising.

So what kind of purpose analysis does Justice Scalia do, and what does he offer as support for the statute's purpose? The following chart provides an overview of the kinds of arguments

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[163] Zeppos, *supra* note 8, at 1096 n.94.

[164] *Id.* at 1095-96.

and authorities that Justice Scalia marshals for his view of statutory purpose.

2. "Absurdity-Lite"

Justice Scalia's most frequent purposive move in these dissents is to argue that the result he reaches is not anomalous or that the majority's result is anomalous—a kind of "absurdity-lite" argument.[165] Thirty-nine percent of the dissents in my sample involving a regular statute contained some argument about the apparent anomaly of a given result.

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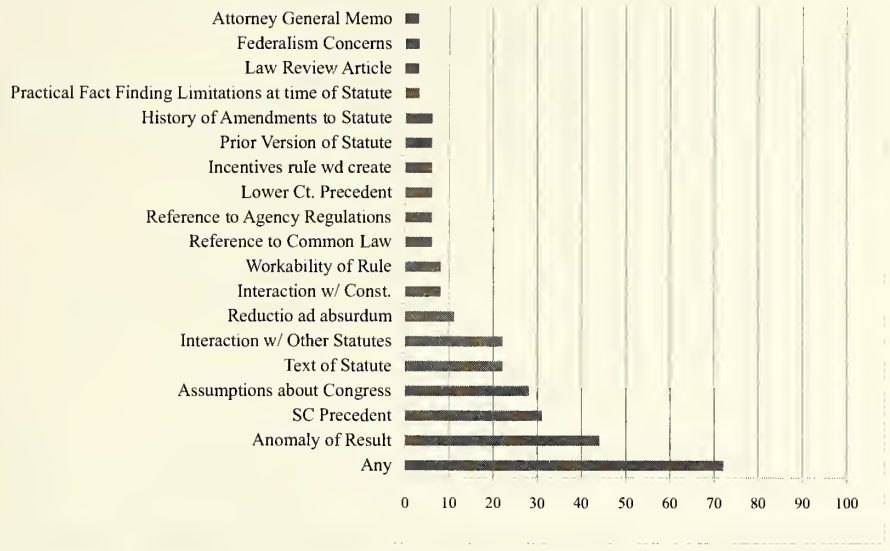
[165] This represents twenty-one different cases and twenty-six different issues. Three cases appear twice because they deal with distinct interpretive issues. The cases are: Day v. McDonough, 547 U.S. 198 (2006) (interpreting AEDPA, 28 U.S.C. § 2244); Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (interpreting the Detainee Treatment Act); Till v. SCS Credit Corp., 541 U.S. 465 (2004) (interpreting Chapter 13 of the Bankruptcy Code); Olympic Airways v. Husain, 540 U.S. 644 (2004) (interpreting Warsaw Convention, Oct. 29, 1934, 49 Stat. 3000); Barnhart v. Peabody Coal Co., 537 U.S. 149 (2003) (interpreting the Coal Industry Retiree Health Benefits Act); Gisbrecht v. Barnhart, 535 U.S. 789 (2002) (interpreting 42 U.S.C. § 406(b) of the Social Security Act); PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001) (appearing twice) (interpreting two different sections of the Americans with Disabilities Act); Johnson v. United States, 529 U.S. 694 (2000) (interpreting 18 U.S.C. § 3583 of the Sentencing Reform Act of 1984); Clinton v. City of New York, 524 U.S. 417 (1998) (interpreting 2 U.S.C. § 692 of the Line Item Veto Act); Hohn v. United States, 524 U.S. 236 (1998); Comm'r v. Estate of Hubert, 520 U.S. 93 (1997) (interpreting the tax code); Lawrence v. Chater, 516 U.S. 163 (1996); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995) (interpreting the Endangered Species Act); United States v. Aguilar, 515 U.S. 593 (1995) (interpreting 18 U.S.C. § 1503); Smith v. United States, 508 U.S. 223 (1993) (interpreting 18 U.S.C. § 924(c)(1) which prohibits using a firearm in connection with the sale of drugs); Dewsnup v. Timm, 502 U.S. 410 (1992) (interpreting 11 U.S.C. § 506(d) of the Bankruptcy Code); INS v. Doherty, 502 U.S. 314 (1992) (interpreting 8 U.S.C. § 1158 of the Immigration Act); Chisom v. Roemer, 501 U.S. 380 (1991); Pauley v. BethEnergy Mines, Inc., 501 U.S. 680 (1991) (appearing twice) (interpreting 30 U.S.C. §§ 902(f)(2), 921, & 923, which deal with benefits for black lung claimants); Bowen v. Massachusetts, 487 U.S. 879 (1988) (appearing twice) (interpreting 5 U.S.C. §§ 702 & 704 of the Administrative Procedures Act); K Mart Corp. v. Cartier Inc., 486 U.S. 281 (1988) (interpreting 19 U.S.C. § 1526 of the Tariff Act of 1930); United States v. Johnson, 481 U.S. 681 (1987) (interpreting 28 U.S.C. § 1346 of the Federal Tort Claims Act).

Chart 7

Types of Purpose Arguments Justice Scalia Makes (Regular Statutes Only, n=36)



Sometimes such an anomaly persuades Justice Scalia to reject the statute's ordinary meaning. In *INS v. Doherty*, for example, an apparent anomaly justified stretching the statutory language.[166] In that case, Justice Scalia argued that under the INS regulations that governed motions to reopen or rehear Board decisions,[167] the United States Attorney General's alteration of a deportee's designated country of deportation was "a new fact" that justified reopening the deportee's asylum petition.[168] Justice Scalia wrote:

> Of course this is not what one would normally think of as a "new fac[t] to be proved at the reopened hearing" or "evidence . . . to be offered." *But the words can technically reach that far*, and unless they are given such an expansive meaning, *the regulations make no sense* because they do not allow obviously necessary remands.[169]

In other words, Justice Scalia reasons that the words of the regulation should be given a less natural, but plausible, meaning because the ordinary meaning of the regulation would frustrate the purpose of the regulation (permitting necessary remands). Hart and Sacks would be proud of their former student.[170] Of course, just how "necessary" the remand was in this case was itself a point of contention between Justice Scalia and the majority.[171]

INS v. Doherty is not an isolated instance in which Justice Scalia has rejected a statute's ordinary meaning to further the statute's purpose. He made the same move in *United States*

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[166] INS v. Doherty, 502 U.S. 314, 338 (1992) (Scalia, J., dissenting).

[167] *See* 8 C.F.R. § 3.8(a) (1987) ("Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material.").

[168] *Doherty*, 502 U.S. at 338.

[169] *Id.* (emphasis added).

[170] *Compare* Justice Scalia's analysis in *id. with* HART & SACKS, *supra* note 18, at 1169 ("In interpreting a statute a court should . . . [d]ecide what purpose ought to be attributed to the statute . . . ; and then . . . [i]nterpret the words of the statute immediately in question so as to carry out the purpose as best it can, making sure, however that it does not give the words . . . a meaning they will not bear . . .").

[171] *See Doherty*, 502 U.S. at 338.

Department of Justice v. Julian.[172] There, he argued that a presentence report question prepared by a probation officer for a court was an "inter-agency memorandum," even though courts are not "agencies."[173] He wrote,

> It is textually possible and much more in accord with the purpose of the provision, to regard as an intra-agency memorandum one that has been received by an agency, to assist it in the performance of its own functions, from a person acting in a governmentally conferred capacity other than on behalf of another agency—*e. g.*, in a capacity as employee or consultant to the agency, or as employee or officer of another governmental unit (not an agency) that is authorized or required to provide advice to the agency. Here we have a memorandum that fits readily within this definition.[174]

Well, perhaps courts do fit the definition of "agency"—so long as you define "agency" to mean "agencies and other *non*-agency governmental units." But of course, that was the very question that the case posed.

Frequently, Justice Scalia uses the "absurdity-lite" argument to support his textual interpretations. For example, Justice Scalia chastised the majority in *Commissioner v. Estate of Hubert* for "creat[ing] a tax boondoggle never contemplated by Congress."[175] In *Babbitt v. Sweet Home* he observed that the Court's interpretation of the word "take" to include habitat modification that harms an endangered species would permit the "Secretary [of the Interior] to evaluate, willy-nilly, impermissible 'habitat modification' (under the guise of 'harm') in § 1538 (a)(1)(B)."[176] That is "passing strange," he observes, when "Congress carefully . . . define[d] 'critical habitat' . . . in § 1536(a)(2).[177] In *Smith v. United States*, he argued that "uses a firearm" should be read narrowly to mean *violent* uses only.

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[172] U.S. Dep't of Justice v. Julian, 486 U.S. 1, 14-18 (1988) (Scalia, J., dissenting).

[173] *Id.* at 18 n.1.

[174] *Id.*

[175] Commissioner v. Estate of Hubert, 520 U.S. 93, 122 (1997) (Scalia, J., dissenting).

[176] Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 724 (1995) (Scalia, J., dissenting).

[177] *Id.*

Were "uses" interpreted more broadly, the statute would punish nonviolent uses as harshly as violent ones.[178] He scolded the majority in *PGA Tour, Inc. v. Martin* for holding that the PGA Tour is a public accommodation.[179] The holding, he argued, created the anomaly that employees and independent contractors of public accommodations have broader ADA protections than "employees and independent contractors of other businesses."[180] And in *K Mart Corp. v. Cartier* he accused the majority of departing from the ordinary meaning of the phrase "of foreign manufacture" in order to adopt an interpretation that was "inconceivable, since it would have the effect of eliminating § 526(a)'s protection for . . . [those whom] the Court describes as the 'prototypical' gray-market victims."[181]

3. Case Law Supplies Statutory Purpose

Justice Scalia has urged judges to restrain their tendency to interpret statutes as though they were elaborating common law principles: "the Mr. Fix-it mentality of the common-law judge is a sure recipe for incompetence and usurpation" of the legislature's law-making role.[182] But, the data show that Justice Scalia has a hard time resisting his own common law impulses. Non-binding Supreme Court and lower court case law support about a third of his interpretations of regular statutes. For example, he thought that the majority's interpretation of the Freedom of Information Act was obviously wrong because "the FOIA is not meant to provide documents to particular individuals who have special entitlement to them, but rather 'to inform the *public* about agency action.'"[183] He quoted *NLRB v. Sears, Roebuck & Co.*, a 1975 Supreme Court decision that elaborated FOIA's purposes. According to Justice Scalia, FOIA's purpose is simply "too well established to warrant extensive

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[178] Smith v. United States, 508 U.S. 223, 243-44 (1993).

[179] PGA Tour, Inc. v. Martin, 532 U.S. 661, 694 (2001) (Scalia, J., dissenting).

[180] *Id.*

[181] K Mart Corp. v. Cartier, 486 U.S. 281, 319-20 (1987) (Scalia, J., dissenting).

[182] SCALIA, *supra* note 6, at 14.

[183] U.S. Dep't. of Justice v. Julian, 486 U.S. 1, 17 (1988) (Scalia, J., dissenting) (citing NLRB v. Sears Roebuck & Co., 421 U.S. 132, 143 n.10 (1975).

discussion–or at least until today has been."[184]

Justice Scalia dissented in *Hohn v. United States* from the Court's holding that a district court's denial of a prisoner's petition for a certificate of appealability under AEDPA constitutes a "case" that a prisoner can appeal.[185] Justice Scalia cited a Seventh Circuit case for the proposition that "certificates of appealability" are "screening device[s], helping to conserve judicial (and prosecutorial) resources."[186] Justice Scalia reasoned that permitting such appeals, as the Court's interpretation does, would obviate that purpose.[187]

Justice Scalia again invoked precedent in his dissenting opinion in *Day v. McDonough*. In that case the majority held that a district judge could, on his own initiative, raise the issue of whether a prisoner's habeas petition under AEDPA was time barred.[188] The State in *Day* had mistakenly conceded that the petition was timely.[189] Equitable considerations of "comity, finality, and the expeditious handling of habeas proceedings" persuaded the Court to conclude that the State had not irrevocably waived the defense by failing to plead it in its answer.[190] Justice Scalia disagreed with the majority that it was appropriate for the district court to consider equitable principles.[191] He pointed out that under the Court's traditional habeas practice (which AEDPA replaced) there was no statute of limitations at all.[192] The Court had consistently "asserted that the passage of time alone could not extinguish the habeas corpus rights of a person subject to unconstitutional incarceration."[193] "If [under traditional habeas practice] comity and finality did not compel any time limitation at all," Justice Scalia argued, "it

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[184] *Id.*

[185] Hohn v. United States, 524 U.S. 236, 254-65 (1998) (Scalia, J., dissenting).

[186] *Id.* at 257-58 (citing Young v. United States, 124 F.3d 794, 799 (7th Cir. 1997)).

[187] *Id.*

[188] Day v. McDonough, 547 U.S. 198, 212-19 (2006) (Scalia, J., dissenting).

[189] *Id.* at 203 (majority opinion).

[190] *Id.* at 208.

[191] *Id.* at 215 (Scalia, J., dissenting).

[192] *Id.*

[193] *Id.*

follows *a fortiori* that they do not compel making a legislatively created, forfeitable time limitation *nonforfeitable*."[194]

Precedent also fueled his dissent in *Chisom v. Roemer*, a Voting Rights Act case.[195] There he disagreed with the Court that the word "representatives" in that statute could be construed to include judges.[196] Congress amended the Voting Rights Act to reinstate vote dilution claims after the Supreme Court had read them out of the Voting Rights Act.[197] The Court reasoned its interpretation fulfilled that aim.[198] Justice Scalia thought the Court's interpretation went further than that and created vote dilution claims that had never before existed.[199] He explained that the Court had recognized vote dilution claims only if the principle of one-person-one-vote applied to the election, and that principle never applied to judicial elections.[200] His narrower interpretation, thus, could not be criticized for frustrating Congress's purposes.[201]

In each of these cases, Justice Scalia construed a statute against the backdrop of lower court glosses of the statute or in light of case law that construed predecessor statutes. This practice conflicts with one of Justice Scalia's core principles of statutory interpretation. Recall that Justice Scalia derides judges for approaching the task of statutory interpretation as though they were elaborating common law principles.[202] In his view, statutes have supplanted this kind of common law lawmaking. Using earlier courts' glosses to understand the purpose of the statute does not necessarily supplant the statutory text. It does, however, *supplement* that text with the judiciary's gloss, and it certainly imparts a common law flavor to the task of statutory interpretation.

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[194] *Id.* at 214.

[195] Chisom v. Roemer, 501 U.S. 380, 404-17 (1991) (Scalia, J., dissenting).

[196] *Id.* at 405.

[197] *Id.*

[198] *Id.* at 403-04 (majority opinion).

[199] *Id.* at 404-17 (Scalia, J., dissenting).

[200] *Id.* at 414-15.

[201] *Id.* at 413-15.

[202] SCALIA, *supra* note 6, at 14-15. *See supra* notes 48-51 and accompanying text.

4. Putting Purposes in Congress's Mouth

Justice Scalia rarely consults legislative history in the cases in my sample—only 9% contain such citations. Nevertheless, he frequently and explicitly refers to Congress's apparent purpose for passing legislation. This is true whether he is interpreting common law statutes or regular ones. Where do his ascriptions of Congressional purpose come from? The cases in my sample provide no answer to this question.

Sometimes Justice Scalia offers only a cursory explanation for his belief that Congress had a particular goal in mind, apparently inferring Congress's purpose from the statutory text itself. That was the case in *United States v. Johnson*.[203] In *Johnson*, Justice Scalia argued that the Feres Doctrine and the Federal Tort Claims Act (FTCA) did not bar a helicopter pilot's suit against the government.[204] Justice Scalia argued that the FTCA's exemptions should be read narrowly because a careful reading of the exemptions revealed that "Congress considered the uniformity problem . . . yet it chose to retain sovereign immunity for only some claims affecting the military."[205] One FTCA exemption, he argued, "excludes any claim arising out of *the combatant activities* of the military or naval forces, or the Coast Guard, *during time of war* . . . demonstrating that Congress specifically considered, and provided what it thought needful for, the special requirements of the military."[206]

Justice Scalia also inferred the statute's purpose from its text in *Bowen v. Massachusetts*.[207] In his opinion, a district court could not review a Health and Human Services Agency's decision to deny reimbursement to Massachusetts for certain social security expenses.[208] Massachusetts' reimbursement suit sought "money damages," he argued, and could only be brought in the claims court.[209] Congress intended when it enacted

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[203] United States v. Johnson, 481 U.S. 681, 696 (1987).

[204] *Id.* at 693.

[205] *Id.* at 696 (internal quotations omitted).

[206] *Id.* at 693.

[207] Bowen v. Massachussetts, 487 U.S. 879 (1988).

[208] *Id.* at 913 (Scalia, J., dissenting).

[209] *Id.*

sections 702 and 704 of the Administrative Procedure Act[210] to establish a jurisdictional line—suits for specific relief lay within the jurisdiction of district courts; suits for money damages lay within the claims courts.[211]

Justice Scalia sometimes just insists that a statute has a particular purpose. It was obvious to him that Congress defined "take" in the Endangered Species Act to mean "harm" because it understood human ingenuity in devising ways to harm animals that neither wound nor kill them.[212] The majority's broad reading of "take" was utterly wrongheaded because "[n]o legislature could reasonably be thought to have intended" to prohibit a "large number of routine private activities—for example, farming, ranching, roadbuilding, construction and logging" when the chain of causation between the activity and the harm is remote.[213] He provided no support for any of these assertions, and the majority contested all of them.

Justice Scalia used the same tactic in *Till v. SCS Credit Corp.*, declaring, "[t]here is no conceivable reason why Congress would give secured creditors risk compensation in one case but not the other."[214] In his view, the majority's approach for calculating the rate of interest due to creditors paid in installments under a bankruptcy plan insufficiently compensated the creditors for their risk. Failure to appropriately compensate creditors would ultimately undermine Congress's core purpose (again asserted) of preserving "widespread access to credit."[215]

Similarly, when dissenting from the majority's decision that district courts could grant another supervised release to a prisoner whose first supervised release had been revoked, he declared:

> [i]t would have been entirely reasonable for Congress to

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[210] 5 U.S.C. §§ 702 & 704 (2000 & Supp. 2008).

[211] *Bowen*, 487 U.S. at 920-21.

[212] Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 721 (1995) (Scalia, J., dissenting).

[213] *Id.*

[214] Till v. SCS Credit Corp., 541 U.S. 465, 505-06 (2004) (Scalia, J., dissenting).

[215] *Id.* at 508.

> conclude that a prisoner who had broken the terms of supervised release seriously enough to be reincarcerated should not be trusted in that status again; and that a judge should not be tempted to impose an inappropriately short period of reimprisonment.[216]

Whether the statutory text demonstrates that Congress actually did come to that conclusion is, of course, the very subject of his dispute with the majority.

Other times, Justice Scalia imputes knowledge to Congress without providing support that Congress possessed that knowledge. For example, in *Dewsnup v. Timm*, he argued "Congress had good reason to be solicitous of the debtor's right to redeem personal property . . . since state redemption laws are typically less generous for personalty than for real property."[217] It is beside the point whether Congress *actually* knew that—a "reasonable congressman" would know.

5. Assertion That It Is "Common Sense"

Sometimes Justice Scalia simply asserts that it is common sense that a statute was intended to prevent or engender some end. For example, he argued that the Americans with Disabilities Act did not prevent the PGA Tour from requiring Casey Martin to walk during golf tournaments because it was "common sense" that the content of the goods or services of a place of public accommodation was beyond the scope of the ADA.[218] Certainly, Justice Scalia thought, the ADA does not require shoe stores to sell shoes singly rather than in pairs; by the same token the PGA could require Casey Martin to walk.[219] Along the same lines, Justice Scalia argued in Bowen v. Massachusetts that a state could be required to sue in the court of claims for Medicaid reimbursement because there is a

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[216] Johnson v. United States, 529 U.S. 694, 724 (2000) (Scalia, J., dissenting).

[217] *Dewsnup*, 502 U.S. 410, 428 (1992) (Scalia, J., dissenting).

[218] PGA Tour, Inc. v. Martin, 532 U.S. 661, 698 (2001) (quoting Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 560 (7th Cir. 1999); *id.* at 691 (Scalia, J., dissenting) ("The judgment distorts the text of Title III, the structure of the ADA, and common sense. I respectfully dissent.").

[219] *Id.*

"common sense presumption" that money damages are an adequate remedy with regard to statutes that obligate the government to pay money.[220]

6. Workability of the Rule

In a small proportion of the issues in my sample (14%), Justice Scalia considered whether the interpretation adopted by the court provided a workable rule. In general, he favored those rules that provide clearer guidance to the parties and courts charged with implementing them. He dissented in *Gisbrecht v. Barnhart* in part because the method the Court adopted for calculating attorneys' fees in social security cases did not provide "clear criteria" to be applied by the lower courts that will be calculating such fees.[221]

In *Commissioner v. Estate of Hubert* an extensive analysis of the competing interpretations' workability laid the ground for Justice Scalia's dissent.[222] The question was how to determine the extent of the marital deduction under the estate tax, which under treasury regulations must account for "any material limitations upon [a surviving spouse's] right to income" from inherited property. [223] Under the Court's rule, the marital deduction "reflect[s] the date-of-death value of the expected future administration expenses . . . ." [224] Justice Scalia criticized the Court for rejecting the IRS's interpretive guidance in favor of a "reading [that] is needlessly confusing to implement"[225] and

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[220] Bowen v. Massachusetts, 487 U.S. 879, 927 (1988) (Scalia, J., dissenting). *See also* Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 711 (1991) ("It defies common sense to argue that, given this structure, the two regulations are in fact identical . . ."); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1007 (2005) (arguing that for the inputs of a service to constitute an offer it is "sufficient" but not necessary that they be offered separately because "[i]f . . . I" ask "a pizzeria . . . whether they offer delivery, both common sense and common 'usage' would prevent them from answering: 'No we do not offer delivery—but if you order a pizza from us, we'll bake it for you and then bring it to your house.'").

[221] Gisbrecht v. Barnhart, 535 U.S. 789, 812 (2002) (Scalia, J., dissenting).

[222] Commissioner v. Estate of Hubert, 520 U.S. 93, 122 (1997) (Scalia, J., dissenting).

[223] *Id.* at 135-36.

[224] *Id.* at 110.

[225] *Id.* at 129.

"virtually impossible for taxpayers and the Internal Revenue Service to apply."[226] A principled estimation at the date of death of *future* administrative expenses was impossible in his view.[227] According to Justice Scalia, that should have led the court to reject its chosen method: "We should be very reluctant to attribute to the Code or the Secretary's regulations the intention to require this sort of inherently difficult inquiry, especially when the key regulation is best read to require that account be taken of *actual* expenses."[228]

Workability also tipped the scales for Justice Scalia in *Till v. SCS Credit Corp.*, a bankruptcy case.[229] In *Till*, the Court determined what interest rate a bankrupt debtor should pay when making installment payments to a creditor.[230] Justice Scalia thought debtors should pay the same rate they had originally contracted to pay because that rate was easy to ascertain; it would reduce transaction costs between parties by eliminating litigation; and it would simplify a bankruptcy judge's task.[231] The majority's formula in *Till* of the prime rate plus some risk premium would mire judges in a whole host of "imponderable" questions about the likelihood of the creditor being fully compensated by the bankruptcy plan.[232] All in all, Justice Scalia maintained that "defects of the formula approach far outweigh those of the contract-rate approach."[233]

In each of these cases, Justice Scalia weighed competing interpretations based in part on whether an interpretation created a workable rule. It is hard to disagree that, all things being equal, workable rules are better than ones that are difficult to understand or administer. It should go without

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[226] *Id.* at 122.

[227] *Id.* at 136 ("Just how a court, presiding over a tax controversy many years after the decedent's death, is supposed to blind itself to later-developed facts, and gauge the expected administration expenses and anticipated income just as they would have been gauged on the date of death, is a mystery to me.").

[228] *Id.*

[229] Till v. SCS Credit Corp., 541 U.S. 465 (2004).

[230] *Id.* at 491 (Scalia, J., dissenting).

[231] *Id.*

[232] *Id.* at 498-99.

[233] *Id.* at 498.

saying, however, that in choosing among competing interpretations, not all things are equal. A decision in favor of ease of administration is also a decision where workability outweighs the substantive values furthered by other interpretations. Justice Scalia is willing to elevate the value of workability above other substantive values.

Finally, workability does not exist in a vacuum. Statutes are more or less workable only in relation to some end, which again raises the question of how Justice Scalia determines those ends. Frequently, Justice Scalia substitutes his own judicially selected policy norms (to use Professor Schacter's terminology)[234] for external evidence of those ends. Justice Scalia may find workable solutions, but they are not principled or neutral ones.

III. CONCLUSION

This study shows that Justice Scalia consults an eclectic set of extrinsic materials when construing statutes. He uses the same broad set of materials as other Justices, with the exception of legislative history.

This study found that Justice Scalia's methodology is eclectic, as well. In a quarter of the cases in this sample, Justice Scalia abandoned textualism in favor of overtly common law methods. When interpreting regular statutes, his presumption in favor of ordinary meaning did little work for him. In a majority of cases, Justice Scalia construed statutory language in light of its specialized, legal meaning or the meaning it accrued in case law or in common law.

Justice Scalia is a purposivist judge—whatever his theory says to the contrary. The data show that he interprets statutes in light of purpose as frequently as the rest of the Court. Sometimes purpose drives his interpretation; if statutory purpose requires it, he is willing to adopt second-best textual interpretations. Sometimes Justice Scalia infers statutory purpose from statutory text, other times from agency regulations. Both inferences might be consistent with his theory of interpretation.

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[234] *See supra* note 9 and accompanying text.

His purposive analysis, however, often diverges from his stated methodology. Earlier Court decisions and lower court decisions often inform his understanding of a statute's purpose. Indeed, this is so often the case that his statutory interpretation practice bears an uncanny resemblance to the kind of common law interpretation of statutes that Justice Scalia's theory deplores.

His purposive analysis frequently stems from the least formal source of all—his own sense of a statute's aims, his sense of absurd or anomalous results, and his sense of what would provide a workable solution. Indeed, the data show a striking absence of formalism in Justice Scalia's actual interpretive practice.

Perhaps it is not surprising that Justice Scalia interprets statutes with an eye toward their purposes. What legislators hope a statute will accomplish is part of a statute's context, and Justice Scalia says that textualist judges should be sensitive to that context. There are two problems with this potential defense. First, it is inconsistent with Justice Scalia's stated methodology that judges should consider a disputed phrase's *textual* context. Second, Justice Scalia's practice of considering a statute's purpose exacerbates his concerns about judicial discretion. That is not because purposive analysis is inherently at odds with limited judicial discretion. (In my own view, purposive analysis can provide a principled resolution to apparent textual ambiguities.) Rather, it exacerbates the problem of discretion for Justice Scalia because he refuses to cite legislative materials for authority.

Compared to ipse dixit purposivism, the evils of legislative history are grossly overstated. Justice Scalia's fears about the use of legislative history are probably baseless in any case. The variety of viewpoints and arguments legislative history offers is no greater than those offered by other extrinsic or extra-legal sources. As with any resource, it can be used or misused.

It is implausible to think that legislatures produce nothing but cheap, misleading talk. If they did, they would never get anything done. The recent work of Professors Cheryl Boudreau, Arthur Lupia, Mathew McCubbins, and Daniel Rodriguez on the

application of communication theory to legislative history demonstrates that legislative history can be used judiciously.[235] They argue that judges should "listen" to legislators' "conversations" as though they were a "fly on a wall."[236] Legislators do not believe everything they hear from each other, and so judges interpreting statements in the legislative record "should not treat legislators' conversations as though legislators were listening naively to everything or being lied to about everything."[237] Instead, "judges should trust only those sources that were trustworthy for the constitutionally empowered set of legislators who passed the bill at the time of the communication." [238]

Trustworthy sources of legislative history can be distinguished from merely strategic (and untrustworthy) statements by noticing the institutional context of utterances and determining whether there were "incentives" in place to "make it clear to all observers" of the utterance that a "false statement[] [is] more costly than others."[239] Judges should ignore statements that do not meet this condition. Justice Scalia simply worries too much about being able to discern when legislators or staff members have strategically (and dishonestly) planted "evidence" in the legislative history to gain through the back door what they could not achieve in the statutory text.

This study has shown that Justice Scalia is not much of an ordinary meaning judge. Most of his dissents fit well within the legal process tradition that he learned in law school, except for the fact that legal process scholars permitted the careful use of

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[235] Cheryl Boudreau, Arthur Lupia, Mathew D. McCubbins, & Daniel B. Rodriguez, *What Statutes Mean: Interpretive Lessons from Positive Theories of Communication and Legislation*, 44 SAN DIEGO L. REV. 957 (2007).

[236] *Id.* at 972.

[237] *Id.* Specifically, the authors argue that the "intentional stance" developed by Daniel Dennett to interpret communication "requires that judges treat legislators as rational actors with beliefs, desires, and intentions and then interpret their statements in this light." *Id.*

[238] *Id.* at 974.

[239] *Id.* at 975. In particular, the authors identify three independent conditions for sincerity. A statement is sincere if made in a context in which: the speaker and listener have common interests; there are penalties for lying; or there are methods to verify the veracity of the representations. *Id.* at 976.

legislative materials. In light of this study's findings, Justice Scalia's refusal to consult the legislative history cannot be considered to be a principled application of an ordinary meaning methodology because in many other respects he freely departs from this methodology.

APPENDIX A

Cases in the sample:

Alaska v. United States, 545 U.S. 75 (2005) (interpreting the Alaska Statehood Act and 43 U.S.C. §§ 1311, 1313 (Submerged Lands Act of 1953))

Almendarez-Torres v. United States, 523 U.S. 224 (1998) (interpreting 8 U.S.C. § 1326)

Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995) (interpreting 16 U.S.C. §§ 1538, 1532 of the Endangered Species Act of 1993)

Barnhart v. Peabody Coal Co., 537 U.S. 149 (2003) (interpreting 26 U.S.C. § 9706(a) (Coal Industry Retiree Health Benefit Act of 1992))

Bowen v. Massachusetts, 487 U.S. 879 (1988) (interpreting 5 U.S.C. §§ 702, 704 (Administrative Procedures Act), 28 U.S.C. § 1491 (Tucker Act), 5 U.S.C. § 704 (Administrative Procedures Act), and 42 U.S.C. § 1396 (Medicaid))

Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987) (interpreting 16 U.S.C. § 1451 (Coastal Zone Management Act), 16 U.S.C. § 1600 et seq. (National Forest Management Act), and 43 U.S.C. § 1701 et seq. (Federal Land Policy and Management Act of 1976))

Chisom v. Roemer, 501 U.S. 380 (1991) (interpreting 42 U.S.C. § 1973 (Voting Rights Act of 1965))

Clinton v. City of New York, 524 U.S. 417 (1998) (interpreting 2 U.S.C. § 692 (Line Item Veto Act of 1996))

Day v. McDonough, 547 U.S. 198 (2006) (interpreting 28 U.S.C. § 2244 (Antiterrorism and Effective Death Penalty Act of 1996))

Dewsnup v. Timm, 502 U.S. 410 (1992) (interpreting 11 U.S.C. § 506(d) (Bankruptcy Code))

Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992) (interpreting 15 U.S.C. §§ 1-2 (Sherman Anti-Trust Act))

Ferens v. John Deere Co., 494 U.S. 516 (1990) (interpreting

28 U.S.C. § 1404(a) (forum nonconveniens))

Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004) (interpreting 29 U.S.C. § 621 (Age Discrimination in Employment Act of 1967))

Gisbrecht v. Barnhart, 535 U.S. 789 (2002) (interpreting 42 U.S.C. § 405 (Social Security Act))

Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (interpreting Detainee Treatment Act § 1005(e)(1), 10 U.S.C. § 801, *superseded by statute*, 28 U.S.C. § 2241(e))

Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) (interpreting 15 U.S.C. § 1 (Sherman Anti-Trust Act) and 28 U.S.C. § 1331)

Hohn v. United States, 524 U.S. 236 (1998) (interpreting 28 U.S.C. § 1254(1) (Antiterrorism and Effective Death Penalty Act of 1996))

Houston v. Lack, 487 U.S. 266 (1988) (interpreting 28 U.S.C. § 2107 and Fed R. App. P. 4(a)(1))

INS v. Doherty, 502 U.S. 314 (1992) (interpreting 8 U.S.C. §§ 1158, 1253(h)(1) (Immigration and Nationality Act))

Comm'r v. Estate of Hubert, 520 U.S. 93 (1997) (interpreting 26 U.S.C. §§ 2055, 2056, 642(g), and 26 C.F.R. § 20.2056(b) - 4(a)).

Jefferson County v. Acker, 527 U.S. 423 (1999) (interpreting 28 U.S.C. § 1442)

Johnson v. United States, 529 U.S. 694 (2000) (interpreting 18 U.S.C. § 3583 (Sentencing Reform Act of 1984))

Key Tronic Corp. v. United States, 511 U.S. 809 (1994) (interpreting 42 U.S.C. § 9607 (Comprehensive Environmental Response, Compensation, and Liability Act of 1980))

K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988) (interpreting 19 U.S.C. § 1526 (Tariff Act of 1930))

Lawrence v. Chater, 516 U.S. 163 (1996) (interpreting 28 U.S.C. § 2106)

Moskal v. United States, 498 U.S. 103 (1990) (interpreting 18 U.S.C. § 2314)

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (interpreting Communications Act of 1934))

Olympic Airways v. Husain, 540 U.S. 644 (2004) (interpreting 49 U.S.C. § 40105 (1934) (Article 17 of Warsaw Convention))

PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001) (interpreting 42 U.S.C. § 12182 (Americans with Disabilities Act of 1990))

Pauley v. BethEnergy Mines, Inc., 501 U.S. 680 (1991) (interpreting 30 U.S.C. §§ 902(f)(2), 921, & 923)

Peretz v. United States, 501 U.S. 923 (1991) (interpreting 28 U.S.C. § 636(b)(3) (Federal Magistrates Act))

Rasul v. Bush, 542 U.S. 466 (2004) (interpreting 28 U.S.C. § 2241 (Habeas Corpus))

Richardson v. McKnight, 521 U.S. 399 (1997) (interpreting 42 U.S.C. § 1983)

Ricoh Corp. v. Stewart Org., Inc., 487 U.S. 22 (1988) (interpreting 28 U.S.C. § 1404(a))

Smith v. United States, 508 U.S. 223 (1993) (interpreting 18 U.S.C. § 924(c)(1))

Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991) (interpreting 15 U.S.C. § 1 (Sherman Anti-Trust Act))

Till v. SCS Credit Corp., 541 U.S. 465 (2004) (interpreting 11 U.S.C. § 1325 (Chapter 13 of the Bankruptcy Code))

United States v. Aguilar, 515 U.S. 593 (1995) (interpreting 18 U.S.C. § 1503)

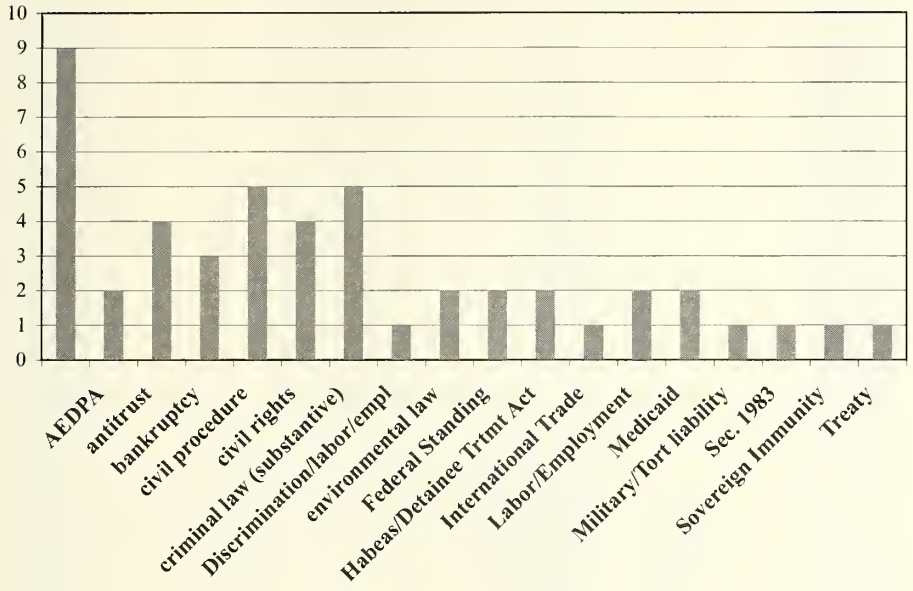
United States v. Johnson, 481 U.S. 681 (1987) (interpreting 28 U.S.C. § 1346 (Federal Tort Claims Act))

U.S. Dep't of Justice v. Julian, 486 U.S. 1 (1988) (interpreting 5 U.S.C. § 552 (Freedom of Information Act) and Fed. R. Crim. P. 32(c)(3)(E))

United States v. Mead Corp., 533 U.S. 218 (2001) (interpreting 5 U.S.C. § 706 (Administrative Procedure Act))

United States v. O'Hagan, 521 U.S. 642 (1997) (interpreting 15 U.S.C. § 78j(b) (§ 10(b) of the Securities Exchange Act of 1934))

Areas of Law Represented in Sample (All Issues)



Scalia's Statutory Interpretive Method

If specialized meaning, what special field?

Justifies Use of SM ☐ Yes ☐ No

What Kind of Precedent

Purpose analysis & basis

☐ Yes
☐ No

- ☐ Text of statute
- ☐ Supreme Court precedent
- ☐ Gloss on Supreme Court Precedents
- ☐ Interaction of statute with other statutes
- ☐ Anomalous result
- ☐ interaction of statute with federalism concerns
- ☐ interaction of statute with constitution
- ☐ reference to congress
- ☐ workability of rule
- ☐ Department of Justice Regulations
- ☐ reductio ad absurdum
- ☐ Law Review Article
- ☐ lower court precedent
- ☐ Not anomalous result
- ☐ prior version of statute
- ☐ Other…

Other Purpose Analysis:

Cites other statute(s)

Cites earlier version of statute

Supreme Court Precedent (cite)

Scalia's Statutory Interpretive Method

Other court precedent

Secondary Sources Cited in Support of Statute: ☐ Yes ☐ No

Type of Secondary Source

☐ General Dictionary	☐ Common Law	☐ Supreme Court Precedents
☐ Legal Dictionary	☐ Treaty	☐ Law Review Article
☐ Other Language Authority	☐ Treatise	☐ Other…

☐

Add New Secondary Source

Limits sources to ones contemporaneous with statute's passage ☐ yes ☐ no ☐ can't tell

Scalia's Statutory Interpretive Method

Canons: ☐ Yes ☐ No

Type of Canon ☐ Linguistic Inference ☐ Textual Integrity ☐ Substantive ☐ Other...
☐ Grammar ☐ In Pari Materia ☐ Common Law

☐

Add New Canon

Agency Interpretation: ☐ Yes ☐ No

Agency Name

Agency Type ☐ Regulation ☐ Adjudication ☐ Interpretive Guidance ☐ Other...

Standard of Review

☐ Defers ☐ Rejects ☐ not ambiguous ☐ interp not reas ☐ Other...

ESSAY

WHAT THE *HEIN* DECISION CAN TELL US ABOUT THE ROBERTS COURT AND THE ESTABLISHMENT CLAUSE

*Carl H. Esbeck**

The United States Supreme Court handed down its much-anticipated decision in *Hein v. Freedom From Religion Foundation*[1] on June 25, 2007, in the final week before summer recess. This is the first case involving church-state relations to come before the Supreme Court with the two newest Justices in place, Chief Justice Roberts and Justice Alito. Additionally, in this and other cases, Justice Kennedy was being closely watched to see if he would move to a "new middle" since Justice O'Connor is no longer on the Court. There were no church-state cases on the docket for the 2007 Term, and *Hein* could prove to be the last word on Establishment Clause matters for some time.[2]

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[1] 127 S. Ct. 2553 (2007) (plurality opinion).

[2] On March 31, 2008, the United States Supreme Court granted a writ of certiorari in *Pleasant Grove City v. Summum*, 128 S. Ct. 1737 (2008). The case will be argued during the Court's 2008 Term. The record in *Pleasant Grove* presents an interesting issue concerning how to distinguish private religious speech from government religious speech. The Free Speech Clause is relevant only if the expression is private religious speech, whereas the Establishment Clause is of relevance only if the expression is government religious speech. Should the Supreme Court find (contrary to the circuit court) that the expression is government religious speech, then the case will be remanded to the lower court to consider, as a matter of first impression, whether the

Justice Alito announced the judgment of the Court in *Hein* and delivered an opinion joined by Chief Justice Roberts and Justice Kennedy.[3] In this controlling opinion,[4] Justice Alito said federal taxpayers lacked standing to pursue a claim that certain discretionary actions by executive branch officials were in violation of the Establishment Clause.[5] The officials sued were members of the staff working on President George W. Bush's faith-based initiative.[6] These officials were staging conferences throughout the country that were alleged by plaintiffs to promote the initiative in a manner that favored religious over secular social service providers. The conferences were not specifically authorized by Congress, but were paid from monies appropriated for the normal operating expenses of the Executive Office of the President (hereinafter EOP).[7] Either President Bush or a cabinet secretary would keynote these conferences, and the plaintiffs (although not personally present) further complained that conference speeches included remarks that endorsed religion or theism over nonreligion or atheism.[8] The

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speech violates the Establishment Clause. Accordingly, the question before the High Court in *Pleasant Grove* does not call for a decision concerning an alleged violation of the Establishment Clause. For more about the proceedings below, *see* Summum v. Pleasant Grove City, 483 F.3d 1044 (10th Cir. 2007), *petitions for reh'g and reh'g en banc denied*, 499 F.3d 1170 (10th Cir. 2007).

[3] 127 S. Ct. at 2559.

[4] When the Supreme Court fails to issue a majority opinion, the opinion of the members who concur in the judgment on the narrowest grounds is controlling. Marks v. United States, 430 U.S. 188, 193 (1977). Soon after *Hein* was handed down, there was debate about whether Justice Alito's plurality or Justice Kennedy's concurring opinion was on the narrowest grounds and thus the controlling opinion. *See, e.g.*, Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle:* Hein v. Freedom from Religion Foundation, Inc. *and the Future of Establishment Clause Adjudication*, 2008 BYU L. REV. 115, 130 (2008). However, there is little to no difference between the two opinions in either substance or tone. They are nowhere inconsistent. Justice Kennedy wrote separately to illustrate additional ways in which extending taxpayer standing to the facts in *Hein* would be harmful to the doctrine of separation of powers. The lower federal courts will almost certainly draw upon and follow both opinions, with Justice Alito's plurality being regarded as controlling.

[5] The Establishment Clause provides as follows: "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

[6] *Hein*, 127 S. Ct. at 2560 (plurality opinion).

[7] *Id.* at 2566.

[8] *Id.* at 2559-61.

plaintiffs were the Freedom From Religion Foundation, Inc. (hereinafter FFRF) and three of its members. Located in Madison, Wisconsin, FFRF is a nonprofit public-interest organization of agnostics and atheists dedicated to a strict separation of church and state.[9]

Justice Kennedy fully joined the plurality but filed a concurring opinion.[10] Justice Scalia filed an opinion concurring in the judgment, which was joined by Justice Thomas.[11] Justice Souter filed a dissenting opinion, in which Justices Stevens, Ginsburg, and Breyer joined.[12] Thus the split was 3-2-4, with five Justices voting to reverse the United States Court of Appeals for the Seventh Circuit.[13]

The 1968 decision of *Flast v. Cohen*[14] was the first occasion for the Supreme Court to permit taxpayer standing, but two conditions had to be met.[15] In *Hein*, Justice Alito said that *Flast*

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[9] Information about FFRF is available at its website, http://www.ffrf.org/purposes.

[10] *Hein*, 127 S. Ct. at 2572 (Kennedy, J., concurring).

[11] *Id.* at 2573 (Scalia, J., concurring).

[12] *Id.* at 2584 (Souter, J., dissenting).

[13] A divided panel of the Seventh Circuit had earlier held that plaintiffs had standing to sue as federal taxpayers. Freedom From Religion Found. v. Chao, 433 F.3d 989 (7th Cir. 2006), *rev'd sub nom.* Hein v. Freedom From Religion Found., 127 S. Ct. 2553 (2007). The panel's majority opinion was written by a jurist of note, Judge Richard Posner. A petition for rehearing en banc was denied by a vote of seven to four. Freedom From Religion Found. v. Chao, 447 F.3d 988 (7th Cir. 2006). An opinion concurring in the denial of a rehearing was written by another prominent jurist, Judge Frank Easterbrook, who urged the Supreme Court to grant a review of the matter and clear up the "arbitrariness . . . built into the doctrine" of taxpayer standing. *Id.* at 990.

[14] 392 U.S. 83 (1968).

[15] In what has come to be called the "double-nexus test," *Flast* said that taxpayer standing was allowed if the following test was satisfied. "First, the taxpayer must establish a logical link between [taxpayer] status and the type of legislative enactment attacked. . . . Secondly, the taxpayer must establish a nexus between [taxpayer] status and the precise nature of the constitutional infringement alleged." *Id.* at 102. Between *Flast* and *Hein*, two Supreme Court cases examined assertions of taxpayer standing where the underlying claim on the merits was brought under the Establishment Clause. In *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), the Court held that taxpayers lacked standing to challenge a decision by a federal executive agency to declare certain government-owned real estate as surplus and then transfer the real estate free of charge under the Property Clause, U.S. CONST. art. IV, § 3, cl. 2, to a Christian college. *Valley Forge*, 454 U.S. at 466-69. *Flast* permitted taxpayer standing only when the taxpayer-plaintiff was challenging Congress' use of its Taxing and Spending Power, U.S. CONST. art. I, § 8, cl. 1. *Valley*

should be applied according to its terms, but its scope is not to be expanded to the facts presently before the Court.[16] The Court in *Flast* permitted taxpayer standing for an Establishment Clause challenge to an exercise by Congress of its taxing and spending power.[17] Justice Alito wrote in *Hein* that for there to be federal taxpayer standing a plaintiff must challenge expenditures "funded by a specific congressional appropriation" and disbursed in support of religion "pursuant to a direct and unambiguous congressional mandate."[18] The *Flast* test did not fit the situation in *Hein* because, in Justice Alito's view, "[t]hese appropriations [to the EOP] did not expressly authorize, direct, or even mention the [faith-based initiative] expenditures of which [plaintiffs] complain."[19] Rather, FFRF's challenge was to how officials within the Office of Faith-Based and Community Initiatives were exerting their efforts and using EOP financial resources to stage faith-based conferences in pursuit of the President's policy initiative. In short, executive branch officials were said to be unconstitutionally promoting the work of faith-based social service providers over secular providers, and to be otherwise endorsing religion.[20] Such activity was not attributable to Congress.[21]

Seven of the Justices in *Hein* said that they will continue to apply the *Flast* test for taxpayer standing.[22] A somewhat

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Forge, 454 U.S. at 478-82. In *Bowen v. Kendrick*, 487 U.S. 589 (1988), the Court held that taxpayer-plaintiffs had standing to challenge a congressional social service program that provided grant funding to secular and religious counseling centers promoting teen chastity. *Id.* at 618-20. The Court went on to uphold the constitutionality of the program on its face, but remanded for further proceedings with respect to "as applied" challenges. *Id.* at 600-18, 620-22.

[16] *Hein*, 127 S. Ct. at 2565-68, 2571-72 (plurality opinion).

[17] The Taxing and Spending Clause provides in relevant part: "The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1.

[18] *Hein*, 127 S. Ct. at 2565 (plurality opinion).

[19] *Id.* at 2566.

[20] *Id.* at 2561.

[21] *Id.* at 2566.

[22] Chief Justice Roberts, along with Justices Stevens, Kennedy, Souter, Ginsburg, Breyer, and Alito would continue to apply *Flast*. *See id.* at 2568; *see also id.* at 2587-88 (Souter, J., dissenting).

different group of five Justices would not expand the scope of *Flast*.[23] Justices Scalia and Thomas would overrule *Flast* and never permit taxpayer standing.[24]

While the matter directly at hand is the scope of taxpayer standing first permitted in *Flast*, this extended essay uses the "injury in fact" requirement for standing to delve into the manner by which the four opinions in *Hein* give insight into how the Roberts Court approaches the Establishment Clause and hence the judiciary's role in policing government support for religion. The essay also demonstrates how a "generalized grievance," for which standing is generally denied, necessarily involves a claim where a structural clause of the Constitution is said to be violated rather than a rights-based claim. The above questions are all the more interesting because *Hein* is the first church-state case to come before the Supreme Court since the two newest Justices, Chief Justice Roberts and Justice Alito, were appointed. Getting to those questions requires that we first examine the nature of standing, the subject of Part I.

I. STANDING TO SUE

Standing is a doctrine of justiciability derived from the Cases or Controversies Clause in Article III of the Constitution.[25] It implicates separation of powers in the sense of being a limit on the federal judiciary's subject matter jurisdiction. Standing has three requirements: "injury in fact," causation, and redressability.[26] "Injury in fact" means that the plaintiff has suffered some actual or imminent harm.[27]

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[23] Chief Justice Roberts, along with Justices Kennedy, Scalia, Thomas, and Alito would not expand *Flast*. *See id.* at 2568 (plurality opinion); *see also id.* at 2584 (Scalia, J., concurring).

[24] *See id.* at 2573-74, 2584 (Scalia, J., concurring).

[25] The Constitution provides in relevant part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under [federal law, and] – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; [and to certain other cases]." U.S. CONST. art. III, § 2, cl. 1.

[26] Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-62 (1992) (holding, *inter alia*, that a congressional grant of standing to all U.S. citizens to challenge certain regulatory actions was unconstitutional).

[27] *Id.* at 560.

Causation means that the harm is fairly traceable to the defendant.[28] Finally, redressability means that the harm can be redressed by a remedy traditionally known to Anglo-American courts of law and equity.[29]

Just because the United States Constitution is alleged to be violated does not give a plaintiff standing to sue. Rather, the complainant must be someone who is specifically injured by the putative violation.[30] A claim that the government is not following the Constitution, without more, is what the Supreme Court calls a "generalized grievance." A "generalized grievance" is one suffered by the entire body politic when the government does not follow the law. A "generalized grievant" is thus without standing because he or she is without concrete injury. It is not a numbers game. That is, it is not that the plaintiff lacks standing because many others also suffer the same injury.[31] Rather, it is that the judicial branch has no jurisdiction to hear a claim that the government is violating the law without the complainant having some specific injury attributable to the alleged violation. How is it that the Constitution can be violated and yet no one is individually harmed? That is the subject of Part II.

II. GENERALIZED GRIEVANCES

The United States Constitution is composed of rights and structure. Rights vest in people, as well as the organizations they form. Structure is usefully envisioned as the

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[28] *Id.*

[29] *See id.* at 560-61.

[30] *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 472 (1982). In *Valley Forge*, the Court stated:

> Although [plaintiffs] claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by [plaintiffs] *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.

Id. at 485-86.

[31] *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 23-25 (1998) (stating that a "generalized grievance" lacks the necessary concreteness, not because the alleged injury is widespread, but because of the abstract nature of the asserted interest or injury).

organizational framework of the national government, which is that of a federal republic.

The presence of a "generalized grievance" never occurs when a plaintiff's claim is that an individual constitutional right has been violated by the government. Rights violations always produce a victim. This is because rights run in favor of people. Thus, when a right is violated, there is always someone or some group that is specifically harmed. And this individualized harm satisfies the "injury in fact" requirement for standing. Of course, the victim may choose to waive his or her constitutional rights and just quietly suffer the harm. However, if the right is not waived but asserted, it cannot be said that the harmed plaintiff has no standing to sue because the claim is a "generalized grievance."

This is not the situation with respect to a violation of a structural clause in the United States Constitution. The nature of a structural clause speaks to the government's powers and duties. The national government is one of limited, delegated powers.[32] There are checks and balances running between and among the three branches. These limits on power are structural in nature, and the checks run against the government or the branches and officials thereof. These limits or checks on the power of the various branches of the government yield individual liberty, but this liberty comes only as a consequence of the structural clauses working to check and balance the power of the government's various branches and officials. Accordingly, sometimes (not always) structure can be violated but no person or organization suffers a concrete injury; that is, there is no individualized "injury in fact." When this occurs, no person or group has standing to sue. Instead, there is a "generalized grievance."

Ex parte Levitt[33] is an early example of a structural violation where no one was specifically injured, so no one had

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[32] This was implicit in the Constitution of 1787. It was then made explicit in the Tenth Amendment, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[33] 302 U.S. 633 (1937) (per curiam).

standing to sue. The case involved President Franklin D. Roosevelt's appointment of Justice Hugo Black to the United States Supreme Court. Albert Levitt, in his capacity as a citizen and as a member of the Supreme Court's bar, petitioned the Court to delay the appointment because, when nominated, Hugo Black was a member of the United States Senate. Congress had recently voted to increase the retirement benefits of members of the Supreme Court. Albert Levitt argued that the Appointments Clause[34] prohibits a member of Congress from immediately assuming an appointment in the judicial branch when, during the member's elected term, "the Emoluments" of the office were increased via retirement benefits for the Court's Justices. The purpose of this structural clause is a good one, namely, to prevent members of Congress from using their offices for personal financial gain. And Albert Levitt's claim that the Constitution was violated certainly appeared to have some merit. Instead of reaching the merits, however, the Supreme Court dismissed for lack of standing.[35] The Court said that to invoke its jurisdiction a petitioner "must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action[,] and it is not sufficient that he has merely a general interest common to all members of the public."[36] Albert Levitt was a "generalized grievant."

Similarly, in *United States v. Richardson*,[37] the Court denied standing to a plaintiff who claimed the Account Clause[38] required Congress to disclose the appropriation of all public monies. The purpose of this structural clause is also a good one because it compels Congress to be transparent in how public funds are appropriated. The plaintiff sought disclosure of the

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[34] The Appointments Clause provides in relevant part: "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States . . . the Emoluments whereof shall have been encreased during such time . . . ." U.S. CONST. art. I, § 6, cl. 2.

[35] 302 U.S. at 634.

[36] *Id.*

[37] 418 U.S. 166 (1974).

[38] The Account Clause provides in relevant part: "[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." U.S. CONST. art. I, § 9, cl. 7.

Central Intelligence Agency (CIA) budget, which, if brought to light, would have revealed covert operations and other state secrets.[39] Although the government ostensibly violated a structural duty by classifying as secret all appropriations to the CIA, no one suffered a concrete injury. The absence of a personalized injury required dismissal for lack of standing.[40] Richardson's assertions of standing both as a citizen and as a taxpayer were rejected,[41] and the claim was dismissed as a "generalized grievance."

Schlesinger v. Reservists Committee to Stop the War[42] was decided the same day as *Richardson*. Plaintiffs claimed that members of Congress who also drew pay as reserve officers in the armed forces violated a structural clause prohibiting members of Congress from simultaneously holding positions in the executive branch.[43] The structural clause is a good one, seeking to prevent conflicts of interest when members of Congress have divided loyalties because they also hold paid jobs in the executive branch. But no one was specifically injured as a result of the ostensible violation, so again the Supreme Court dismissed the matter because it was a "generalized grievance."[44]

Levitt, *Richardson*, and *Schlesinger* illustrate well the idea of a "generalized grievance." A rights violation will always produce a victim, and thereby a person or organization with individualized "injury in fact." That is not the case with a violation of a structural clause. It necessarily follows that when a "generalized grievance" occurs, the nature of the constitutional clause alleged to be violated is structural as opposed to rights-based. This has implications for the Roberts Court and its view of the Establishment Clause, as will become evident in Parts III and IV.

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[39] *Richardson*, 418 U.S. at 175 & n.8.

[40] *Id.* at 180.

[41] *Id.* at 176-80.

[42] 418 U.S. 208 (1974).

[43] The Constitution provides in relevant part: "[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. CONST. art. I, § 6, cl. 2.

[44] *Schlesinger*, 418 U.S. at 216-27.

III. THE RULE AGAINST TAXPAYER STANDING AND *FLAST*'S EXCEPTION

The general rule is that there is no standing to sue as a federal taxpayer when alleging a violation of the United States Constitution.[45] When one sues asserting taxpayer standing, the plaintiff is not asking for a portion of his or her taxes to be lowered or refunded. Nor is the focus of the plaintiff on the lawfulness of the tax. Rather, the focus is on some generalized constitutional violation that the plaintiff wants stopped. However, for a federal court to enjoin the alleged constitutional violation the plaintiff must first have standing to sue; hence, one must have "injury in fact." The complaint is a "generalized grievance."[46]

In 1968, the Court handed down *Flast v. Cohen*,[47] which made an exception to the foregoing rule. At issue in *Flast* was the Elementary and Secondary Education Act of 1965,[48] a provision of which provided federal funding to nonpublic schools for educational equipment, as well as for classes in reading and arithmetic.[49] Funding was available to K-12 nonpublic schools without regard to possible religious affiliation. Insofar as funding was made available to religious and religiously affiliated schools, plaintiffs sued under the Establishment Clause alleging a violation of church-state separation.[50]

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[45] Massachusetts v. Mellon, 262 U.S. 447 (1923). Of course, the rule against taxpayer standing does not apply to situations where the claimant is suing as a taxpayer because she is due a tax refund or because she is the victim of an illegal tax. In these latter instances, there is individualized "injury in fact."

[46] Justice Alito said as much in *Hein* when he wrote that "if every federal taxpayer could sue to challenge any Government expenditure, the federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus." Hein v. Freedom From Religion Found., 127 S. Ct. 2553, 2559 (2007) (plurality opinion).

[47] 392 U.S. 83 (1968).

[48] Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

[49] *Flast*, 392 U.S. at 85-86.

[50] *Id.* at 85-88. The plaintiffs in *Flast* also brought a claim under the Free Exercise Clause, U.S. CONST. amend. I. *Flast*, 392 U.S. at 85, 103. However, in remanding for further proceedings, the Court only permitted the taxpayer-plaintiffs to proceed with their claim under the Establishment Clause. *Id.* at 103-05. That makes sense. The Free Exercise Clause is rights-based. If there was a rights violation, there would be a victim,

Plaintiffs were not individually harmed by the federal funding. Rather, they remained at liberty to exercise their own religion (if they had one), as well as any other constitutional right they might have. They had no specific "injury in fact" and thus no standing to sue. Indeed, no one had "injury in fact." For example, the public schools were not harmed. Just because some religious schools were funded did not mean that public schools would get less money; government aid to education is not a zero sum game. And nonpublic schools receiving federal funding were not harmed because the funding was optional; no nonpublic school was being forced to take the government aid. Because plaintiffs had no specific harm, the complainants in *Flast* sued in their capacity as federal taxpayers.[51]

Following longstanding precedent, the lower federal courts dismissed for lack of standing.[52] The Supreme Court reversed. The plaintiffs in *Flast* sought no tax refund or reduction in their taxes, thus tax money was not their "injury in fact."[53] Rather, the plaintiffs' alleged injury was that the government's money went in support of religion, a "generalized grievance." So the Court adopted a legal fiction. The fiction is that every taxpayer has an individualized interest, vested in the Establishment Clause understood as a power-denying restraint on congressional appropriations being directed in aid of religion.[54]

When *Flast* permitted taxpayer standing the claim on the

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and thereby a plaintiff with "injury in fact" and standing to sue. Taxpayer standing is never needed for claims under the Free Exercise Clause. For this reason, the Court has twice rejected taxpayer standing claims brought under the Free Exercise Clause. *See* Tilton v. Richardson, 403 U.S. 672, 689 (1971) (federal taxpayers lacked the requisite burden on religion to pursue free exercise claim); Bd. of Educ. v. Allen, 392 U.S. 236, 248-49 (1968) (same holding with respect to state taxpayers).

[51] *Flast*, 392 U.S. at 85, 88.

[52] Flast v. Gardner, 271 F. Supp. 1 (1967), *rev'd sub nom.* Flast v. Cohen, 392 U.S. 83 (1968).

[53] *Flast*, 392 U.S. at 85-88.

[54] *Id.* at 105 ("We have noted that the Establishment Clause of the First Amendment does specifically limit the taxing and spending power conferred by Art. I, § 8."). The *Flast* Court had earlier characterized the Establishment Clause as, *inter alia*, having two purposes, the second being implicated here: "Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Id.* at 103.

merits was not that the plaintiffs were individually coerced against their religious conscience to pay taxes to support the religion of others—for that would be attempting to assert a rights-based violation where the Supreme Court has consistently ruled that there is no such right.[55] Rather, damages in the form of an indeterminate (and surely *de minimis*) amount of taxes paid are a surrogate in *Flast* for what is otherwise a "generalized grievance" caused by an improper relationship between church and state (here, a relationship in the form of the government funding K-12 religious schools).

Taxpayer standing under *Flast* is not characterized as a legal fiction to disparage the case. Nor is it called a fiction because *Flast* over-reads the Establishment Clause. Rather, *Flast* standing is called a legal fiction simply as an apt description. Indeed, Justice Alito candidly acknowledged the fiction, stating in *Hein* that "[i]n light of the size of the federal budget, it is a complete fiction to argue that an unconstitutional federal expenditure causes an individual federal taxpayer any measurable economic harm."[56]

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[55] The Court has taken up a violation-of-conscience claim brought under the Free Exercise and Establishment Clauses and rejected both of them. The plaintiffs in *Flast* claimed that payment of a general federal tax, the monies of which were appropriated to religious schools, was religious coercion in violation of the Free Exercise Clause. *Flast*, 392 U.S. at 103, 104 n.25. The Court chose to defer deciding whether that averment stated a claim, and declined to decide whether a federal taxpayer even had standing to raise such a claim. In *Tilton*, the Court returned to the issue and held that a federal taxpayer's claim of religious coercion did not state a claim for which relief can be granted under the Free Exercise Clause. Tilton v. Richardson, 403 U.S. 672, 689 (1971). *See also supra* note 50. In *Valley Forge*, claimants challenged the transfer of government property at no charge to a religious college as violative of the Establishment Clause. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464 (1982). Several asserted bases for standing were unsuccessful because claimants lacked the requisite "injury in fact." *Id.* One of the rejected bases was that claimants had a "spiritual stake" in not having their government give away property for a religious purpose or to act in any other way contrary to no-establishment values. The Court held that a "spiritual stake" in having one's government comply with the Establishment Clause is not a cognizable injury. *Id.* at 486 n.22.

[56] Hein v. Freedom From Religion Found., 127 S. Ct. 2553, 2559 (2007) (plurality opinion). *See also* Louis Henkin, *Forward: On Drawing Lines*, 82 HARV. L. REV. 63, 74 (1968) ("And it is a fiction that a taxpayer like Flast is asserting a personal stake or interest based on his reluctance to have his tax money expended for the purpose to which he objects.").

Flast's adoption of the legal fiction of taxpayer standing permitted the Supreme Court to reach the merits in the absence of a complainant suffering specific "injury in fact" or actual harm. This is unique, for no claim on the merits other than one brought under the Establishment Clause has ever been permitted in a federal court by a plaintiff asserting taxpayer standing.[57] Referencing the period 1776-1786 when the State of Virginia disestablished the Anglican Church,[58] the *Flast* Court said that the "concern of [James] Madison and his [Virginia] supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers" to directly aid religion.[59] The principles behind the Virginia disestablishment were then equated by the Court in *Flast* with the meaning of the Establishment Clause. And the meaning, in the Court's view, was that the Establishment Clause was a restraint "designed as a specific bulwark against such potential abuses of governmental power, and that [the] clause . . . operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8."[60]

In his dissent in *Hein*, Justice Souter characterized the taxpayers' claim in *Flast* as "the protection of liberty of

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[57] *See Hein*, 127 S. Ct. at 2568-69 (plurality opinion), 2587 n.4 (Souter, J., dissenting) (conceding that taxpayer standing has been recognized only in claims brought under the Establishment Clause); DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 347-49 (2006) (denying taxpayer standing in complaint alleging a violation of the Dormant Commerce Clause).

[58] *See* THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA 1776-1787, at 38-172 (1977); H. J. ECKENRODE, SEPARATION OF CHURCH AND STATE IN VIRGINIA: A STUDY IN THE DEVELOPMENT OF THE REVOLUTION 74-115 (Da Capo Press 1971) (1910); CHARLES F. JAMES, DOCUMENTARY HISTORY OF THE STRUGGLE FOR RELIGIOUS LIBERTY IN VIRGINIA 68-141 (Da Capo Press 1971) (1900).

[59] *Flast*, 392 U.S. at 103-04.

[60] *Id.* at 104. This attribution of the ideas behind the Virginia experience of 1776-1786 to the intended meaning of the Establishment Clause as drafted by the First Congress in 1789, and its subsequent ratification by the states during 1789-1791, is dubious as a matter of history. However, the Court in *Flast* was following a path the Court had already traveled twenty years earlier in *Everson v. Bd. of Educ.*, 330 U.S. 1, 11-13 (1947). *See* Carl H. Esbeck, *The 60th Anniversary of the* Everson *Decision and America's Church-State Proposition*, 23 J.L. & RELIGION 15, 17-26 (2007-2008).

conscience,"[61] whereas Justice Scalia characterized the plaintiffs' claim as protection from "psychic injury."[62] Both are wrong. A taxpayer who is highly separationist on church-state matters is no more "injured" in her conscience when general tax revenues are appropriated from the public treasury to support religion than is a racial minority "injured" when general tax revenues are appropriated from the public treasury to support a white segregationist academy. Yet, according to the Court, there is standing in the former case brought under the Establishment Clause but not in the latter case brought under the Equal Protection Clause. This is not logical. That is because there is no actual injury in *Flast*, and the sooner we all stop looking for it the better off we will be. The logic of the Court's thinking in *Flast* is to be found elsewhere, namely in the difference between a claim brought under the modern Establishment Clause and a rights-based claim such as one brought under the Equal Protection Clause.

Like all legal fictions, the fiction in *Flast* was adopted for instrumental purposes. If the *Flast* Court had not entertained the fiction, legislative bodies everywhere (federal, state, and local) could appropriate money for general aid-to-education programs, allow religious schools to be equally eligible for the programs, and no one will have standing to challenge the programs as being in violation of the Establishment Clause. A starker example would be Congress appropriating money to pay the salaries of all religious ministers or clergy who applied for the funds. Without taxpayer standing under *Flast*, no one would have standing to challenge such a law in federal court which surely strikes at the core of the American church-state settlement.

Flast allowed the suit to go forward where there was a mere "generalized grievance." *Flast* thus enabled a more expansive judicial enforcement of the Establishment Clause. Indeed, after *Flast* a complainant may also assert state or local taxpayer

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[61] *Hein*, 127 S. Ct. at 2585 (Souter, J., dissenting) (quoting Zelman v. Simmons-Harris, 536 U.S. 639, 711 n.22 (2002) (Souter, J., dissenting)).

[62] *Id.* at 2574 (Scalia, J., concurring).

standing in order to pursue a claim that the Establishment Clause is violated.[63] This follows because what matters with the legal fiction in *Flast* is not the particular government promulgating the tax, but that the claim on the merits is a legislative appropriation said to be in violation of the Establishment Clause. On the other hand, by allowing the legal fiction, the Court in *Flast* weakened the requirement of standing to sue, which in turn weakened the doctrine of separation of powers.[64] It was a trade-off.[65] The *Flast* Court believed that there was a compelling need for such a trade-off, and this tells us something very important about the character of the modern Establishment Clause, the subject of Part IV.

IV. THE ESTABLISHMENT CLAUSE IS REGARDED AS STRUCTURAL IN NATURE

How is it that there can be a colorable claim that the Establishment Clause is violated but no one is harmed? If the Supreme Court regards the modern Establishment Clause as structural, then we know that structural violations can occur, and yet the complainant is a "generalized grievant." Because the Court deems the fiction of taxpayer standing as necessary in

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[63] *Compare* Doremus v. Bd. of Educ., 342 U.S. 429, 434 (1952) (rejecting assertion of state taxpayer standing to challenge a state law authorizing devotional Bible reading in public schools because "the grievance which [the plaintiff] sought to litigate [i.e., their unwanted exposure to the Bible reading] . . . is not a direct dollars-and-cents injury [to a taxpayer] but is a religious difference."), *with* Sch. Dist. v. Ball, 473 U.S. 373, 380 n.5 (1985) (collecting cases in which state taxpayer standing was allowed).

[64] When *Flast* permits state or local government taxpayer standing the trade-off is not with the doctrine of separation of powers but with federalism. That is, federal court jurisdiction results in judicial intervention into the affairs of legislative bodies at the state and local level. Justice Kennedy noted this in *Hein*, 127 S. Ct. at 2573 (Kennedy, J., concurring) ("The Court has refused to establish a constitutional rule that would require or allow 'permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of *federalism* and the separation of powers.'" (emphasis added) (quoting Garcetti v. Ceballos, 547 U.S. 410, 423 (2006)).

[65] In his concurring opinion, Justice Kennedy was candid about this trade-off in *Flast*: "The Court's decision in *Flast* and in later cases applying it, must be interpreted as respecting separation-of-powers principles but acknowledging as well that these principles, in some cases, must accommodate the First Amendment's Establishment Clause." *Hein*, 127 S. Ct. at 2572 (Kennedy, J., concurring) (citation omitted).

certain claims under the Establishment Clause, it follows that the Court regards the modern Establishment Clause as structural (or jurisdictional) in its nature and operation—that is, the clause is about the separation of church and government.

Since *Everson v. Board of Education*,[66] the Supreme Court has read the Establishment Clause as embodying a particular understanding of the separation of church and state.[67] In the first half of the nineteenth century the principle was called (and spelled) "voluntaryism."[68] Voluntaryism means religion is to be supported voluntarily, if at all, by those in the private sector—which is to say, not affirmatively supported by government. Voluntaryism goes well beyond prohibiting attempts by the government to force religious belief on individuals or to coerce religiously informed conscience. Voluntaryism is about rejecting government support for religion, whether or not that support results in coercion of conscience.[69] Voluntaryism is also about protecting organized religion from government interference. Hence, church-state separation—rightly understood—is reciprocal. The proper ordering of church-state relations is to the mutual benefit of both the body politic and organized

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[66] 330 U.S. 1, 15 (1947) (holding, *inter alia*, the Establishment Clause is applicable to state and local governments via the Due Process Clause of the Fourteenth Amendment).

[67] *See* Esbeck, supra note 60, at 20-27.

[68] The state-by-state disestablishment of the Anglican Church in the American South and later the Congregational Church in New England, along with the emergence of voluntaryism during the early national period, 1776-1830s, is surveyed in Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1448-1540.

[69] To be sure, coerced religious belief or observance is a violation of conscience. But such coercion is generally a matter for the Free Exercise Clause. Relieving religious coercion is a rights function. That is not what the Court's post-*Everson* Establishment Clause is about. Rather, the modern Establishment Clause is about patrolling the boundary between church and state. That is a structural function. This understanding is reflected in the Supreme Court's cases that distinguish the modern Establishment Clause from the Free Exercise Clause on the basis that the no-establishment principle (unlike free exercise) does not require a showing of coercion of religion-based conscience or other religious harm. *See* Sch. Dist. v. Schempp, 374 U.S. 203, 221 (1963) ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not." (quoting Engel v. Vitale, 370 U.S. 421, 430 (1962))).

religion. Statements observing this mutuality are common in Supreme Court opinions.[70]

The separation of church and state is, by its nature, a structural relationship.[71] Its operation is roughly parallel to the Constitution's structural relationship among the executive, legislative, and judicial branches—which we call separation of powers. The task of the post-*Everson* Establishment Clause is to police the boundary between government and organized religion, thereby keeping these two centers of authority in their proper role or relationship to each other. This is also why legislative appropriations can be thought to undermine the principle of no-establishment—like the federal education payments to religious K-12 schools at issue in *Flast*—yet there is no individual or organization with "injury in fact," and thus no one with traditional standing to sue.

This is not to say that there is never individuated "injury in fact" when the Establishment Clause is violated. Sometimes there is. On occasion, the Establishment Clause has provided redress for individual harms: economic harm or loss of property;[72] constraints on academic freedom and inquiry by

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[70] *See, e.g.*, Ill. *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948) ("For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."); Watson v. Jones, 80 U.S. (13 Wall.) 679, 730 (1871) ("The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority.").

[71] That the Supreme Court has regarded the modern Establishment Clause as ordering relations between church and state is manifest in the Court's case law, not just in reduced-rigor standing rules but in several additional ways. *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J.L. & POL. 445, 456-71 (2002) (discussing relaxed standing rules; remedies for non-religious harm and class-wide remedies, not just relief for the claimants before the court; dismissals for lack of subject matter jurisdiction; two definitions of religion, one for the Free Exercise Clause and one for the Establishment Clause, reflecting the different purposes of each clause; and remedies that protect organized religion from its own harmful choices). If *Hein* had overruled *Flast*, the treatment of the Establishment Clause as structural would still be validated by these other features in the Court's case law.

[72] Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (economic harm to department store); Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (economic harm to a tavern).

teachers and students;[73] restraints on free-thinking atheists;[74] and unwanted exposure to government-sponsored religious expression.[75] The same is true with structural violations generally: sometimes there are persons with "injury in fact," but not always. However, the complaint in *Flast* was an example of an alleged structural violation where no one was individually harmed, and thus no one had traditional standing to sue.[76] So is

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[73] Edwards v. Aguillard, 482 U.S. 578 (1987) (public school teacher and students desirous of an expanded science curriculum); Epperson v. Arkansas, 393 U.S. 97 (1968) (same).

[74] Torcaso v. Watkins, 367 U.S. 488 (1961) (ruling in favor of atheist, who by self-profession had no religion and thus no harm to his religion, but who was desirous of holding public office without taking theistic oath).

[75] In the case of government-sponsored religious symbols and other government religious expression, the Establishment Clause protects those necessarily exposed to the unwanted expression. In these unwanted exposure-to-religion cases, the Supreme Court has a reduced-rigor standing requirement. The requisite "injury in fact" for standing is lowered, albeit not eliminated altogether as in *Flast*. *See, e.g.*, O'Connor v. Washburn Univ., 416 F.3d 1216 (10th Cir. 2005), *cert. denied*, 547 U.S. 1003 (2006); Robinson v. City of Edmond, 68 F.3d 1226 (10th Cir. 1995), *cert. denied*, 517 U.S. 1201 (1996). In *Robinson*, the circuit court permitted the claimant standing to challenge, under the Establishment Clause, a city seal that included a Latin cross. 68 F.3d at 1230 n.6. The plaintiff averred that he lived and worked in the city but did not allege that he was directly exposed to the seal on a regular basis. *Id.* at 1228. Three of the Court's Justices dissented from the denial of certiorari, noting a split in the circuits concerning how much unwanted exposure to a religious symbol was required for standing to raise a no-establishment claim. *Robinson*, 517 U.S. at 1202-03 (Rehnquist, C.J., dissenting, joined by Scalia and Thomas, JJ.) (collecting authorities from the circuits, a majority of which permit standing, without more, upon direct but unwanted exposure to the religious symbol in question). In *O'Connor*, the circuit court granted standing to a student and a professor both of whom had to regularly walk by an offending statue on the university's campus. 416 F.3d at 1222-23. The reduced-rigor standing in exposure-to-religion cases is additional evidence that the Court regards the Establishment Clause as structural. There is now concern by some commentators that *Hein* will embolden government lawyers and judges to challenge reduced-rigor standing. *See* Lupu & Tuttle, *supra* note 4, at 162-63.

[76] *Flast* showed just how determined the post-*Everson* Court was to enforce voluntaryism. Even now we see the logic of voluntaryism being pressed with respect to government displays of the Ten Commandments and the "under God" language in the Pledge of Allegiance. *Compare* McCreary County v. ACLU, 545 U.S. 844 (2005) (holding that recent depiction of the Ten Commandments in a county building display violates Establishment Clause), *with* Van Orden v. Perry, 545 U.S. 677 (2005) (plurality opinion) (determining that a stone monument on the grounds of a state capitol building depicting the Ten Commandments that had been in place for several years did not violate the Establishment Clause); *see also* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (holding that plaintiff did not have standing to maintain a claim that voluntary

the complaint in *Hein*. What we should make of the *Hein* decision is taken up in Part V.

V. WHAT TO MAKE OF THE HOLDING IN *HEIN*?

The decision in *Flast* worked to undermine the doctrine of separation of powers.[77] It gave federal courts jurisdiction to pass on the merits of a church-state claim where there was no actual standing to sue, that is, no case or controversy. On the other hand, *Flast* enabled broader judicial enforcement of the modern Establishment Clause, which since *Everson* the Court has read to be the policing of the boundary between church and state—a structural relationship by its nature.

The fiction of taxpayer standing in *Flast* can be justified because the proper structuring of church and state intrinsic to the modern Establishment Clause is *sui generis*, that is, it is unlike other constitutional structures which either run horizontally between the three federal branches (separation of powers) or vertically between the federal government and the governments of the several states (federalism). When either separation of powers or federalism is transgressed, there will be some other government branch eager to defend against the encroachment on its turf. This is not so with violations of church-state separation, especially those involving the appropriation of large sums of money from the public treasury. A religious organization receiving a grant out of general tax revenues (and potentially entangling funding regulations that

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public school student recitation of "under God" in Pledge of Allegiance violates the Establishment Clause).

[77] In *Hein*, Justice Alito took care to link traditional standing back to its roots in separation of powers:

> [Expanding *Flast*] would also raise serious separation-of-powers concerns. As we have recognized, *Flast* itself gave too little weight to these concerns. By framing the standing question solely in terms of whether the dispute would be presented in an adversary context and in a form traditionally viewed as capable of judicial resolution, *Flast* "failed to recognize that this doctrine has a separation-of-powers component, which keep courts within certain traditional bounds vis-à-vis the other branches, concrete adverseness or not." [Plaintiffs'] position, if adopted, would repeat and compound this mistake.

Hein v. Freedom From Religion Found., 127 S. Ct. 2553, 2569-70 (2007) (plurality opinion) (citations omitted) (quoting Lewis v. Casey, 518 U.S. 343, 353 n.3 (1996)).

may compromise the autonomy of the religious organization) is not going to complain about the funding or the accompanying regulatory entanglement. This is because the receipt of the funds is voluntary. In *Flast*, of course, the religious organizations in question were religious K-12 schools, and such schools will not complain about receiving the grant monies or the burden of complying with the accompanying regulations. If the regulations became unbearable or compromised the autonomy of the religious school, then the school would simply refuse the funding. Such behavior is to be expected of any private-sector organization, religious or nonreligious, awarded scarce government funding.

The Court in *Hein* had before it a choice. The Court could have expanded *Flast* standing, and thus enhanced the Court's role in policing the structural relationship between church and state. Or the Court could have reversed *Flast*, and thus restored matters to a traditional view of standing, one which checks federal judicial power and thereby buttresses the doctrine of separation of powers. Both the proper structuring of church-state relations and the faithful adherence to traditional separation of powers are high-value constitutional principles. Either the Court makes a purist's choice between one principle or the other, or the Court is willing to operate in the realm of logical inconsistency in pursuit of deriving some benefit from both purist positions.

In *Hein*, the three-Justice plurality chose neither purist position. It steered the middle road of not overruling *Flast* but also not expanding *Flast*. While not undoing the past, Justice Alito, joined by Chief Justice Roberts and Justice Kennedy, was clear about not wanting to do more damage to the doctrine of separation of powers:

> The rule [plaintiffs] propose would enlist the federal courts to superintend, at the behest of any federal taxpayer, the speeches, statements, and myriad daily activities of the President, his staff, and other Executive Branch officials. This would . . . "open the Judiciary to an arguable charge of providing 'government by injunction[.]'" It would deputize federal courts as "'virtually continuing monitors of the wisdom

and soundness of Executive action,'" . . . .[78]

Justice Kennedy's concurring opinion is even more forthcoming concerning the danger of expanding taxpayer standing to the facts in *Hein*.[79] He said that taxpayer standing should not be extended to situations where congressionally authorized discretionary spending is performed by agencies or officers of the executive branch.[80] In one sense, everything said or done by an agency or officer of the executive branch is made possible only by the expenditure of taxpayer monies for salaries and other general operations. If the judicial branch were to review all such executive branch actions with an eye to church-state boundary transgressions, then the Article III branch would be superintending the day-to-day work of the Article II branch.[81]

As stated above, the legal fiction of *Flast* taxpayer standing is instrumental. Legal fictions seek to do more good than harm. *Flast* had apparently delivered on that promise, for in *Hein* the United States Solicitor General did not argue that the work and independence of the legislative branch had been impeded by the many lawsuits made possible only by the fiction in *Flast*. But if all executive branch utterances and actions were judicially reviewable in a search for church-state boundary violations—and at the behest of hundreds of millions of taxpayers, federal, state, and local—then we would have a clear case of doing more harm than good.

As Justice Kennedy noted, the President of the United States is elected to pursue certain policies favored by the electorate. Vexatious litigation with its extensive discovery requirements can easily derail policy initiatives.[82] Given today's

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[78] *Id.* at 2570 (citations omitted).

[79] *Id.* at 2572 (Kennedy, J., concurring).

[80] *Id.* at 2572-73.

[81] Justice Kennedy wrote:

> The Court should not authorize the constant intrusion upon the executive realm that would result from granting taxpayer standing in the instant case. . . . The separation-of-powers concerns implicated by intrusive judicial regulation of day-to-day executive operations reinforce [Justice Alito's] interpretation of *Flast*'s framework.

Id. at 2573.

[82] Justice Kennedy wrote:

rough-and-tumble politics, a President's opponents would surely use litigation to get their way, where earlier these same opponents had failed to defeat the President at the ballot box. To expand the scope of taxpayer standing beyond *Flast* is to risk considerable harm to separation of powers, with the judicial branch used as an offensive weapon by opponents of the President.[83] That would be destroying the village in order to save it.

Hein preserved but did not expand *Flast*. What this tells us about the modern Establishment Clause from the perspective of the two newest members of the Court is the subject of Part VI.

VI. WHAT DOES *HEIN* TELL US ABOUT THE ROBERTS COURT AND THE ESTABLISHMENT CLAUSE?

Led by Justice Souter, the four dissenting Justices evidenced strong backing for an Establishment Clause

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> The Executive Branch should be free, as a general matter, to discover new ideas, to understand pressing public demands, and to find creative responses to address governmental concerns. The exchange of ideas between and among the State and Federal Governments and their manifold, diverse constituencies sustains a free society. Permitting any and all taxpayers to challenge the content of these prototypical executive operations and dialogues would lead to judicial intervention so far exceeding traditional boundaries on the Judiciary that there would arise a real danger of judicial oversight of executive duties. The burden of discovery to ascertain if relief is justified in these potentially innumerable cases would risk altering the free exchange of ideas and information. And were this constant supervision to take place the courts would soon assume the role of speech editors for communications issued by executive officials and event planners for meetings they hold.

Id. at 2572-73.

[83] Filed in *Hein* was Brief for Legal and Religious Historians and [Certain Named] Law Scholars as Amici Curiae in Support of Respondents, Hein v. Freedom From Religion Found., 127 S. Ct. 2553 (2007) (No. 06-157), 2007 WL 320997. The brief amici makes the point that for the American founders, the King of England as much as Parliament made use of an established church to abuse the religious freedom of dissenters. *Id.* at *5-8. Assuming this historical claim is true, it nonetheless misses the concern that drives the controlling plurality in *Hein*. In the view of the plurality, to extend *Flast* standing to discretionary actions by officials in the executive branch would do major damage to the doctrine of separation of powers. *Flast* adopted the legal fiction that legislative appropriations caused "injury in fact" to the proper ordering of church-state separation. The fiction is a surrogate to permit the justiciability of Establishment Clause claims while doing minimal damage to separation of powers. But the extension of the legal fiction to discretionary executive spending—as *amici* urged—would come at too high a price.

understood as giving rise to a claim in every taxpayer to conscientiously object to any aid to religion from general tax revenues.[84] This is consistent with their voting pattern on prior no-establishment matters.[85] The dissenters sought to expand taxpayer standing, so that the federal courts could enforce the post-*Everson* Establishment Clause in other circumstances. If *Flast* had been extended to the facts in *Hein*, then hundreds of millions of taxpayers (federal, state, and local) would have standing to bring an Establishment Clause claim over public funding of any and all character. That stance can only be described as aggressive. As Justice Kennedy wrote in *Hein*, "[t]o find standing in the circumstances of this case would make the narrow exception [of *Flast*] boundless."[86]

Contrariwise, the three Justices that comprise the plurality were prepared to stay the course with *Flast* and, thus, continue

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[84] *Hein*, 127 S. Ct. at 2585-88 (Souter, J., dissenting).

> "The judgment [in *Flast*] of sufficient injury takes account of the Madisonian relationship of tax money and conscience, but it equally reflects the Founders' pragmatic 'conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions'. . . ."

Id. at 2587-88 (quoting Everson v. Bd. of Educ., 330 U.S. 1, 11 (1947)). For a critique of Justice Souter's historical assertion that James Madison's position on church and state supports the claim that every taxpayer has a right to conscientiously object to tax revenues being appropriated to religious organizations, *see* Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison's Memorial and Remonstrance*, 87 CORNELL L. REV. 783, 789-91 (2002).

[85] *See, e.g.*, McCreary County v. ACLU, 545 U.S. 844, 850 (2005) (Souter, J., for the Court, joined by Stevens, O'Connor, Ginsburg, and Breyer, JJ.) (holding that posting of Ten Commandments as part of a larger historical display at two county courthouses had the purpose of advancing religion and thus violated the Establishment Clause); Zelman v. Simmons-Harris, 536 U.S. 639, 686 (2002) (Souter, J., dissenting, joined by Stevens, Ginsburg, and Breyer, JJ.) (objecting to the majority opinion which upheld a school voucher plan open to religious schools); Mitchell v. Helms, 530 U.S. 793, 867 (2000) (Souter, J., dissenting, joined by Stevens and Ginsburg, JJ.) (objecting to the plurality opinion which upheld direct federal aid to K-12 schools, including religious schools); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 863 (1995) (Souter, J., dissenting, joined by Stevens, Ginsburg, and Breyer, JJ.) (objecting to majority opinion which said that where a state university paid for printing expenses of student newspapers, which payments partly defined the scope of a limited public forum to enlarge student writing, the subsidy did not violate the Establishment Clause when received by a student Christian newspaper).

[86] *Hein*, 127 S. Ct. at 2572 (Kennedy, J., concurring).

the federal judiciary's middling to ambitious enforcement of the modern Establishment Clause.[87] This is a remarkable position for Chief Justice Roberts and Justice Alito. These two newest Justices on the Court were faced with what for them must have been a highly appealing argument in *Hein*, namely, that the judiciary must carefully attend to its doctrines of justiciability and not reach out to decide constitutional questions when the Court's Article III jurisdiction is doubtful. Justice Scalia made that argument in *Hein*.[88] The Chief Justice and Justice Alito were not only unconvinced, but they vigorously defended *Flast*'s application as doing useful work over its forty-year history.[89]

An alternative scenario is that Chief Justice Roberts sought to steer the Court into ruling narrowly, so as to hand down a five-Justice majority opinion.[90] Such an opinion could not overrule *Flast* if it was to retain Justice Kennedy's vote, for Kennedy expressly said *Flast* was correctly decided.[91] With that as a given, for Justices Scalia and Thomas to join such a majority opinion, the author would have had to say that the Seventh Circuit should be reversed without overruling *Flast*—thus leaving reconsideration of *Flast* for another day.[92] But Justices Scalia and Thomas were unwilling to leave *Flast* in place, and they concurred separately. This scenario, however, does not explain why, once it was clear that no majority opinion was possible, Chief Justice Roberts and Justice Alito did not form a four-Justice plurality with Justices Scalia and Thomas and state that they would expressly overrule *Flast*. Instead, Chief Justice Roberts and Justice Alito stayed with Justice Kennedy, indicating they both sincerely believe the Court should continue to adhere to *Flast*.

Some commentators have said Justice Alito's plurality

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[87] *Id.* at 2571-72 (plurality opinion).

[88] *Id.* at 2573 (Scalia, J., concurring, joined by Thomas, J.).

[89] *Id.* at 2565-69 (plurality opinion).

[90] The virtue of the Supreme Court reaching a majority opinion is that it creates more certainty as to the rule of law and hence more clarity for lawyers giving advice to their clients, as well as less confusion among the lower federal and state courts.

[91] *Id.* at 2572 (Kennedy, J., concurring) ("In my view the result reached in *Flast* is correct and should not be called into question.").

[92] Indeed, the plurality is just such an opinion.

opinion strongly suggests *Flast* was wrongly decided[93] or was being adhered to only out of *stare decisis*.[94] That is not the case. Justice Alito did not say *Flast* was wrongly decided or that it must be followed out of duty to precedent. Justice Alito's only criticism of *Flast* was unremarkable, in that he joined prior opinions of the Court in noting that *Flast* did not give sufficient weight to separation of powers.[95] Perhaps the best evidence that Justice Alito's plurality did not think the rule in *Flast* was wrong is that the three Justices stayed the course in the face of a withering attack by Justice Scalia. In any case, the plurality's approach was that *Flast* from the outset proved to be a useful but narrow exception to the rule against taxpayer standing and that the Court's subsequent decisions have repeatedly turned back attempts to broaden its scope.[96]

Justice Kennedy is equally interesting to observe in *Hein*. When Justice O'Connor was on the Court, she and Justice Kennedy were often the "swing votes" on social-issue cases. They frequently took middle positions on the Establishment Clause,[97] but did not join one another's opinions.[98] With a void

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[93] Lupu & Tuttle, *supra* note 4, at 130 ("Alito strongly suggests that *Flast* was wrong, but is not being overruled because a decision in the government's favor in *Hein* does not require such overruling.").

[94] Jesse Merriam, *In Brief:* Hein v. Freedom From Religion Foundation, THE PEW FORUM ON RELIGION & PUBLIC LIFE, June 12, 2008, http://pewforum.org/docs/?DocID=305 ("Feeling bound by court precedent . . . Alito was unwilling to overrule *Flast* altogether.").

[95] *Hein*, 127 S. Ct. at 2569 (plurality opinion).

[96] *Id.* at 2568-69 (plurality opinion) ("It is significant that, in the four decades since its creation, the *Flast* exception has largely been confined to its facts.").

[97] Justices Kennedy and O'Connor often reached the same judgment in church-state cases but one or both wrote or joined separate opinions. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 663 (2002) (O'Connor, J., concurring) (the majority opinion, which both Justices O'Connor and Kennedy joined, upheld K-12 school vouchers); Mitchell v. Helms, 530 U.S. 793, 836 (2000) (O'Connor, J., concurring) (the plurality opinion, which Justice Kennedy joined, upheld a federal aid program to K-12 schools, including religious schools); Lee v. Weisman, 505 U.S. 577, 580 (1992) (Kennedy, J., for the Court, held that prayer at public school commencement ceremony violated the Establishment Clause); *id.* at 599 (Blackmun, J., concurring, joined by Stevens and O'Connor, JJ.); *id.* at 609 (Souter, J., concurring, joined by Stevens and O'Connor, JJ.); County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 623 (1989) (O'Connor, J., concurring in part and concurring in the judgment, in Part II of which is joined by Brennan and Stevens, JJ.); *id.* at 655 (Kennedy, J., concurring in the judgment in part and dissenting

at the center left by the retirement of Justice O'Connor, there was speculation that Justice Kennedy might move to occupy the new "ideological middle" and thereby enhance his "swing vote" power even more. Justice Kennedy, to his credit, did not do so in *Hein*. His concurring opinion is consistent with his earlier refusal to limit the substantive reach of the Establishment Clause to cases where there is religious coercion.[99]

VII. CONCLUSION

Justice Alito, joined by Chief Justice Roberts and Justice Kennedy, took a Goldilocks stance in *Hein*, in that the decision was not too hot but not too cold. One would have to say that this bodes well for those wanting little change in the Supreme Court's current level of enforcement of the Establishment Clause. *Everson* and *Flast*, as well as the three-Justice plurality in *Hein*, implicitly recognize that the modern Establishment

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in part, joined by Rehnquist, C.J., and White and Scalia, JJ.) (striking down municipal Christmas nativity display as violative of the Establishment Clause, but upholding Menorah as part of larger secular holiday display); Bowen v. Kendrick, 487 U.S. 589, 622 (1988) (O'Connor, J., concurring) (upholding direct federal aid to teenage sexuality counseling centers, including religious centers); *id.* at 624 (Kennedy, J., concurring, joined by Scalia, J.).

[98] For example, Justice Kennedy routinely votes to uphold religiously neutral government aid programs having a secular purpose when some of the aid goes to religious organizations. He was in the majority or part of the plurality in the following cases: *Zelman*, 536 U.S. 639 (holding that school voucher plan did not violate the Establishment Clause); *Mitchell*, 530 U.S. 793 (holding that direct aid to K-12 schools, including religious schools, does not violate the Establishment Clause); *Bowen*, 487 U.S. 589 (holding that direct aid to teen counseling centers, including religious centers, does not violate Establishment Clause). Justice O'Connor also generally voted to uphold such aid programs, but it was not uncommon for her to concur separately placing additional qualifications on the aid or on the administration of the program. *See Zelman*, 536 U.S. at 663 (O'Connor, J., concurring); *Mitchell*, 530 U.S. at 836 (O'Connor, J., concurring in the judgment, joined by Breyer, J.); *Bowen*, 487 U.S. at 622 (O'Connor, J., concurring).

[99] In *Lee v. Weisman*, 505 U.S. 577 (1992), Justice Kennedy for the majority held that where prayers were part of a pubic school commencement exercise they were unconstitutional. It did not matter that plaintiff-student's absence from the exercise carried no penalty. A direct and unavoidable coercion of conscience need not be shown. The optional nature of the exercise did not prevent a student and her parent from being able to state a claim under the Establishment Clause. *Id.* at 586-89. *Cf. id.* at 631-32, 636-41 (Scalia, J., dissenting), calling Justice Kennedy's standard "a boundless test . . . of psychological coercion" and mere "peer-pressure coercion."

Clause functions as a structural clause—keeping in proper order two centers of authority, church and government. Beyond that, it would over-read *Hein* to say that Chief Justice Roberts and Justice Alito have committed to any fixed view of church-state relations—whether it is one allowing no financial aid for pervasively religious organizations,[100] permitting only indirect aid to religious organizations,[101] or one that permits direct as well as indirect aid to religious organizations, so long as the aid is part of a larger program that administers the assistance on a religion-neutral basis.[102]

Hein does mean, however, that public-interest organizations with an ideological devotion to strict no-aid separationism, organizations such as Freedom From Religion Foundation, will continue to have taxpayer standing to litigate their grievances with respect to legislative appropriations. And this is true not only with respect to congressional appropriations, but also appropriations at the state and local level. Thus the courthouse door continues to remain open—but only by half[103]—to bruising culture war litigation where the claimant's only averred injury is abstract and ideological.[104]

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[100] See *Zelman*, 536 U.S. 639, which upheld a school voucher plan as not in violation of the Establishment Clause. Justice Souter dissented stating that he regards the appropriations for vouchers for schooling, including religious schooling, as violative of taxpayers' liberty of conscience. *Id.* at 711, 715 (Souter, J., dissenting). In his reading of the history that gave rise to the Establishment Clause, not "three pence" in tax monies were to make their way into the coffers of K-12 religious schools or other pervasively religious organization. *Id.* at 711-16. *See also supra* note 84.

[101] *See, e.g.*, *Zelman*, 536 U.S. 639, holding school voucher plan did not violate the Establishment Clause because, *inter alia*, the plan directed the funds to the parents who had free choice where to redeem their voucher. *Id.* at 651-56. This is often called indirect funding because the government funds find their way to religious schools only via the parents. It is also called beneficiary choice assistance.

[102] In *Mitchell*, the four-Justice plurality said that it should not make any difference whether the aid was paid by the government directly to the religious school or whether the aid was paid to the parents of students who in turn freely choose to use the aid at a religious school. 530 U.S. at 815-20. The former is often called direct funding. *Id.* at 816.

[103] For a survey of taxpayer standing cases in the lower federal courts since *Hein* was decided, *see* Lupu & Tuttle, *supra* note 4, at 138-51.

[104] We can anticipate an increase in lawsuits by plaintiffs ideologically devoted to strict church-state separationism asserting reduced-rigor standing based on claims of unwanted exposure to religious expression attributable to the government. *See supra*

note 75. These unwanted exposure claims are a variant on the role coercion can play in an Establishment Clause violation. It is, however, a watered-down notion of coercion more akin to the injury of being offended or made to feel like an outsider. See the discussion of *Lee v. Weisman*, *supra* note 99. Although proof of coercion is not required to make out a claim under the Establishment Clause (*see supra* note 69), religious coercion may nonetheless be present. We can also anticipate an increase in lawsuits by these same types of plaintiffs alleging discrimination among religions or religious denominations. *See* Larson v. Valente, 456 U.S. 228 (1982) (holding that state regulatory legislation requiring only certain religious organizations to make reports concerning their contributions and solicitation activities was a violation of the Establishment Clause). Neither of these types of cases requires taxpayer standing, and thus *Hein* does not apply.

RECENT DECISION

Criminal Law—Mental Competence and Right to Self-Representation—A State May Insist on Representation of Counsel for Defendant Who Is Mentally Fit to Stand Trial but Lacks Sufficient Competence to Represent Himself at Trial

I. FACTS

On July 12, 1999, department store security guard Ryan Martin observed store patron Ahmad Edwards place a pair of shoes into his bag and walk out of the store without stopping to purchase the shoes.[1] A struggle ensued when Martin pursued Edwards out of the store and identified himself as store security.[2] As Martin held on to Edwards to prevent his escape, Edwards produced a gun and fired several shots which hit Martin and a bystander.[3] By happenstance, Thomas Flynn, a

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[1] Edwards v. State, 854 N.E.2d 42, 45 (Ind. App. 2006), *rev'd,* 866 N.E.2d 252 (Ind. 2007), *rev'd,* 128 S. Ct. 2379 (2008). These events took place in and near a Parisian Department Store in downtown Indianapolis, Indiana. *Id.*

[2] *Id.* On the street outside the store, Martin identified himself to Edwards as the store security guard, and Edwards turned as if to flee. *Id.* To prevent Edwards' escape, Martin "bear hugged" him but released Edwards and rolled to the ground after having heard a gunshot and realizing that Edwards had a gun in his hand. *Id.*

[3] *Id.* Once free from Martin's grasp, Edwards began to walk away but then stopped, turned, and aimed the gun at Martin's head and fired a shot from a distance of approximately seven feet away. *Id.* The bullet from this shot missed Martin but struck a bystander in the leg. *Id.* Martin later realized that one of Edwards' stray shots had grazed his back. *Id.*

special agent with the Federal Bureau of Investigation, was driving in the vicinity of the department store and heard the shots Edwards had fired during his escape.[4] Agent Flynn targeted Edwards as the possible shooter as Edwards and others ran away from the scene of the gunshots.[5] Agent Flynn pursued Edwards into a parking garage, repeatedly ordered Edwards to drop his gun, subdued him with a shot to the thigh, and arrested him.[6] Three days after the shootings, the State of Indiana charged Edwards with felony attempted murder, felony battery with a deadly weapon, felony criminal recklessness, and felony theft.[7]

During the four years following Edwards' arrest, the state of his mental competency appeared to ebb and flow as he underwent several psychiatric evaluations and was the subject of three hearings concerning his competency.[8] In 2004 an Indiana state hospital reported that Edwards was competent to stand trial.[9] Just before his trial was to begin, Edwards moved to represent himself and requested a continuance so that he could proceed *pro se*.[10] When the court refused his request for a

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[4] *Id.*

[5] *Id.* Agent Flynn stated Edwards' facial expression and other people's attempts to distance themselves from him distinguished Edwards as a possible suspect in the shooting. *Id.*

[6] *Id.* at 45-46. Agent Flynn shot Edwards only after Edwards disobeyed repeated commands to drop his gun and raised his gun in the agent's direction. *Id.* at 46.

[7] *Id.*

[8] Indiana v. Edwards, 128 S. Ct. 2379, 2382-83 (2008). In February and August of 2000, Edwards' court-appointed attorney asked that Edwards undergo psychological evaluations, the results of which persuaded the court that Edwards was incompetent to stand trial. *Id.* at 2382. After several months of treatment in a state hospital, Edwards' condition improved, and he was judged competent to stand trial. *Id.* Yet before trial, Edwards' attorney asked for a second psychiatric evaluation. *Id.* In March 2002, based on the more recent evaluation, the judge found that Edwards was mentally ill yet "competent to assist his attorneys in his defense and stand trial for the charged crimes." *Id.* However, seven months later Edwards underwent a third psychiatric evaluation. *Id.* During the ensuing April 2003 competency hearing, a psychiatrist testified that Edwards did have the capacity to understand the charges against him but was "unable to cooperate with his attorney in his defense because of his schizophrenic illness." *Id.* The court concluded in November 2003 that Edwards was once again incompetent to stand trial and recommitted him to a state hospital. *Id.*

[9] *Id.*

[10] *Id.*

continuance, Edwards went to trial represented by an attorney and was convicted of criminal recklessness and theft, but the jury failed to reach a verdict on charges of attempted murder and battery.[11] The State retried Edwards on the latter two counts, and the court once again denied Edwards' self-representation request.[12] The Court appointed counsel to represent Edwards at his retrial, and the jury convicted him of attempted murder and battery.[13]

On appeal, Indiana's intermediate appellate court reversed the second trial court's judgment and remanded for a new trial.[14] The appellate court held that the trial court's refusal to allow Edwards to represent himself at his retrial, while done with the intention of ensuring fairness and due process, violated his Sixth Amendment right to self-representation.[15] The Supreme Court of Indiana expressed similar understanding for the trial court's ruling yet affirmed the appellate court's decision by holding that the trial court committed reversible error by denying Edwards his constitutional right to proceed *pro se*.[16]

Apparently troubled by this ruling, the State of Indiana petitioned the Supreme Court for a writ of certiorari to clarify

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[11] *Id.*

[12] *Id.* at 2382-83. Edwards' psychiatric reports persuaded the court to believe Edwards still suffered from schizophrenia and conclude Edwards was competent to stand trial but incompetent to defend himself. *Id.*

[13] *Id.* at 2383.

[14] Edwards v. State, 854 N.E.2d 42, 52 (Ind. App. 2006), *rev'd,* 866 N.E.2d 252 (Ind. 2007), *rev'd,* 128 S. Ct. 2379 (2008).

[15] *Id.* The Indiana Court of Appeals acknowledged its sympathy for the trial court's concern regarding Edwards' indefinite mental competency and its corresponding effort to ensure that Edwards receive a fair trial. *Id.* at 48. However, the appellate court reasoned that interpretations of the Sixth Amendment as pronounced in *Faretta v. California*, 422 U.S. 806, 835 (1975) (holding that a state may not force a defendant in a criminal trial to accept assistance of counsel when the defendant voluntarily and knowingly elects to represent himself), and *Godinez v. Moran*, 509 U.S. 389, 398 (1993) (holding that the competency needed to waive right to counsel is not higher than the competency needed to stand trial) precluded the appellate court from upholding the trial court's ruling. *Id.*

[16] Edwards v. State, 866 N.E.2d 252, 260 (Ind. 2007) *rev'd* 128 S. Ct. 2379 (2008). The Indiana Supreme Court deemed reasonable the trial court's assessment that Edwards' ability to represent himself was inadequate. *Id.* Nonetheless, it upheld the court of appeals, holding that Edwards could not be denied the right to self-representation on the ground that he was incapable of presenting his defense when he had already been found competent to stand trial. *Id.*

whether granting the right to self-representation under the Sixth Amendment to a state criminal defendant who is schizophrenic but competent to stand trial would violate due process.[17] The Supreme Court granted certiorari in part and held: vacated and remanded.[18] Where a defendant who desires to represent himself at trial is mentally competent to stand trial but lacks sufficient competency to present his own defense, the United States Constitution allows courts to insist the defendant be represented by counsel.[19]

II. RELATED LAW

Dating back to eighteenth-century England, the common law has recognized the fundamental unfairness of subjecting a mentally infirmed or incapacitated defendant to the rigors of a trial.[20] However, as the common law has evolved alongside scientific understanding of mental illness, American courts have strived to determine more accurately the minimum level of mental competence sufficient to allow a defendant to participate in his trial without violating the sense of fairness and due process ensured by the Constitution.[21]

Like the protection afforded the mentally incompetent, the opportunity to have the assistance of counsel during a criminal trial is a long-standing, basic safeguard against unfairness.[22]

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[17] Petition for Writ of Certiorari, *Edwards*, 128 S. Ct. 2379 (2008) (No. 07-208), 2007 WL 2363244.

[18] *Edwards*, 128 S. Ct. at 2388. *Edwards* was decided 7-2 with Justice Scalia authoring a dissent in which Justice Thomas joined. Justice Breyer delivered the opinion of the Court. *Id.* at 2381.

[19] *Id.* at 2388.

[20] *See* Drope v. Missouri, 420 U.S. 162, 171 (1975). The Court noted that famed English jurist William Blackstone wrote that a defendant who became "mad" either before or after pleading should not be tried because of his inability to make a defense. *Id.* (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 24 (1769)).

[21] *See Drope*, 420 U.S. at 171-72 (noting the prohibition of an incompetent defendant to stand trial has a long history in the common law and is "fundamental to an adversary system of justice").

[22] Faretta v. California, 422 U.S. 806, 818 (1975). The Court commented that the Sixth Amendment includes the "rights necessary for a full defense" and that those rights are "basic to our adversary system of criminal justice" and are thus "part of the 'due

However, these safeguards cannot be applied mechanically; they must be balanced against protections for personal freedom of choice.[23] In particular, the Constitution provides that a criminal defendant who knowingly and intelligently chooses to do so may waive his right to counsel and make his own defense.[24] The Supreme Court considers at what point these two potentially conflicting rights come into accord.

A. Establishing a Standard for Mental Competence to Stand Trial

In 1960 the Supreme Court's decision in *Dusky v. United States* defined the present standard for testing the competency of a defendant to stand trial.[25] Specifically, *Dusky* established that to stand trial a defendant must possess a reasonably sufficient ability to understand the proceedings against him and to consult with and understand communications with his lawyer.[26] In 1975 *Drope v. Missouri* elaborated on the basic

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process of law' that is guaranteed by the Fourteenth Amendment to defendants in the criminal courts of the States." *Id.* The Sixth Amendment states in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

[23] *Faretta*, 422 U.S. at 834. The Court emphasized that the right to defend is personal and the choice to conduct one's own defense "must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *Id.* (quoting Illinois v. Allen, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)). *See also* Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942) (emphasizing that "the procedural safeguards of the Bill of Rights are not to be treated as mechanical rigidities").

[24] *Faretta*, 422 U.S. at 835 (citing Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938)).

[25] Dusky v. United States, 362 U.S. 402 (1960) (per curiam). In *Dusky* a defendant of undetermined mental condition kidnapped a girl and was convicted for unlawfully transporting her from Kansas to Missouri. Dusky v. United States, 271 F.2d 385, 387 (8th Cir. 1959), *rev'd*, 362 U.S. 402 (1960) (per curiam). In its written opinion, the Eighth Circuit sought clarification from the Supreme Court on the proper test to determine the competency of defendants to stand trial. *Id.* at 401.

[26] *Dusky*, 362 U.S. at 402. *Dusky* held that the test a trial judge must consider before allowing a trial to proceed against a defendant of questionable mental capacities is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings against him." *Id.*

capacities at trial that the *Dusky* standard required of a defendant, stating that courts may not subject to a trial a defendant who "lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, *and to assist in preparing his defense.*"[27]

B. Confirming and Shaping the Constitutional Right to Self-Representation

While the right to self-representation in federal court had been secured by statute since the nation's early days, whether a criminal defendant in state court has the constitutional right to waive assistance of counsel and proceed in his own defense came before the Court in *Faretta v. California*.[28] Responding to this issue, the Court established that the Constitution did grant a state criminal defendant the right "to proceed [to trial] without counsel when he voluntarily and intelligently elects to do so."[29] Moreover, the Court forbade a state from forcing a lawyer upon a defendant who clearly and competently does not wish to consult one.[30] This holding built upon the concept, first expressed in *Adams v. United States ex rel. McCann*, that the Sixth Amendment "implicitly embodies a 'correlative right to dispense with a lawyer's help.'"[31] The Court also reasoned that the diction of the Sixth Amendment emphasized that procedural protections encompassed in the Amendment were granted to the

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[27] Drope v. Missouri, 420 U.S. 162, 171 (1975) (emphasis added).

[28] *Faretta*, 422 U.S. at 807, 813-14. Defendant Anthony Faretta had wanted to represent himself at his trial for grand theft. *Id.* at 807. Faretta had a high school education and had previously represented himself in a criminal prosecution. *Id.* Yet after testing Faretta on his understanding of the hearsay rule and the state law governing the challenge of potential jurors, the trial judge determined that Faretta's decision to waive his right to counsel was not made intelligently or knowingly and that he "had no constitutional right to conduct his own defense." *Id.* at 808-10.

[29] *Id.* at 807.

[30] *Id.*

[31] *Id.* at 814 (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942)). The Sixth Amendment does not explicitly grant the right to waive the assistance of counsel. U.S. CONST. amend. VI. However, the *Adams* Court reasoned that unless a correlative right to dispense with the right to counsel exists, the Sixth Amendment procedural safeguards could be used to fetter the free will of a defendant. *Adams*, 317 U.S. at 279.

defendant, not his counsel.[32] Yet, the Court recognized the likely significant disadvantage a desire for self-representation entailed.[33] The Court therefore insisted a defendant could waive the assistance of counsel only when first cautioned about the "dangers and disadvantages of self-representation" and then knowingly and intelligently executing a waiver.[34] Thus, *Faretta* championed a qualified defendant's right to a personal choice of how to orchestrate his defense above overly constrictive procedural safeguards.[35]

Over the years, however, cases such as *McKaskle v. Wiggins* demonstrated that there were limits to the freedom of self-representation.[36]

C. Clarifying the Standard for Mental Competency

Following *Dusky* and *Faretta*, the federal courts of appeals disagreed as to whether the competency standard for pleading guilty or waiving the right to counsel was higher than the standard established for standing trial.[37] In *Godinez*, the Court

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[32] *Faretta*, 422 U.S. at 819-20. The Court reasoned that the Sixth Amendment grants "the accused personally the right to make his defense." *Id.* at 819. The Court continued by indicating that the Sixth Amendment speaks of the "assistance" of counsel, implying that a lawyer should act as the aid, not the master, of the accused. *Id.* at 820.

[33] *Id.* at 834.

[34] *Id.* at 835. The Constitution does not require a defendant to have the "skill and experience of a lawyer" in order to make a competent and intelligent choice regarding self-representation. *Id.* However, a defendant must be made aware of the "dangers and disadvantages of self-representation" before a court can be satisfied that "his choice is made with eyes open." *Id.* (quoting *Adams*, 317 U.S. at 279).

[35] *Id.* at 836. The court held that the state's insistence that Faretta consult with an unwanted attorney deprived the defendant of his constitutional right to conduct his own defense. *Id.*

[36] McKaskle v. Wiggins, 465 U.S. 168 (1984). In *McKaskle*, the trial court allowed the defendant in a robbery trial to proceed *pro se* but assigned him two standby attorneys to explain to the defendant about court rules and courtroom protocol. *Id.* at 170-71. The defendant regularly objected to the attorneys' participation but repeatedly conferred with them. *Id.* at 172-73. After his conviction, the defendant claimed that his attorneys' interference was grounds for a new trial. *Id.* at 173. On appeal, the Supreme Court held that the appointment of a standby counsel to aid a *pro se* defendant did not offend the "dignity and autonomy of the accused" and did not violate Sixth Amendment rights. *Id.* at 176-77, 184.

[37] Godinez v. Moran, 509 U.S 389, 396 n.5 (1993). At the time of the *Godinez* decision, the Ninth Circuit and the District of Columbia Circuit employed a "reasoned

resolved this split by holding that that the two competency standards were, in fact, the same.[38] The Court arrived at this holding because the majority found that the choice of pleading guilty and the choice to waive counsel required no greater mental competency than the choices involved in standing for a trial.[39] Yet, the Court did determine that, in addition to finding a defendant competent to stand trial, a trial court must be certain that the defendant's choice for self-representation is both knowing and voluntary.[40]

III. INDIANA V. EDWARDS

A. Majority Opinion

In *Edwards*, the Court held that the United States Constitution allows the states to insist a defendant be represented by counsel where a defendant who desires to represent himself at trial is mentally competent to stand trial but lacks sufficient competency to present his own defense.[41] In

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choice" standard to weigh the mental competency of a defendant wishing to waive counsel or plead guilty. *Id.* The Ninth Circuit expressed that the reasoned choice standard required "a higher level of mental functioning" than the standard to stand trial determined in *Dusky*. *Id.* at 394 (citing Moran v. Godinez, 972 F.2d 263, 266-67 (9th Cir. 1992), *rev'd*, 509 U.S. 389 (1993)). On the other hand, the remaining ten circuit courts held the two standards to be the same. *Id.* at 396 n.5.

[38] *Id.* at 398.

[39] *Id.* at 398-400. Examining both sides of the coin, the Court reasoned that the decision to plead guilty is not more complicated than other decisions, such as whether to take the witness stand or whether to waive the right to a jury trial, that a defendant may have to make during the course of a trial. *Id.* Likewise, the Court rejected Moran's claim that a defendant who represents himself must have greater judgment and reason than a defendant who goes to trial with the aid of his counsel. *Id.* at 399. Instead, the Court referred to its determination in *Faretta* that the defendant's technical knowledge of the law was not a relevant factor when deciding if a defendant is competent to waive his right to counsel. *Id.* at 399-400 (citing *Faretta*, 422 U.S. at 836).

[40] *Id.* at 400-01 (citing *Faretta*, 422 U.S. at 835). The Court also explained the distinction between the two requirements: while a competency inquiry focuses on the ability to understand proceedings, the "knowing and voluntary" test ensures that the defendant truly "understands the significance and consequences" of his decision to conduct his own defense and that such a decision was not coerced. *Id.* at 401 n.12 (citations omitted).

[41] Indiana v. Edwards, 128 S. Ct. 2379, 2388 (2008).

reaching this holding, the Court initiated its analysis by distinguishing the question before it from those previously decided by Supreme Court precedent.[42] The Court stated that *Dusky* and *Drope* provide the standard used to determine the mental competence needed for a defendant to stand trial.[43] Yet, the Court distinguished both cases on the ground that neither considered how the competency standard related to the right to self-representation.[44] Likewise, the Court noted that *Faretta*'s opinion—establishing a defendant's constitutional right to proceed without counsel when the choice is made voluntarily and intelligently—could not provide a complete answer to the questions raised in *Edwards* because *Faretta* did not address mental competency in its discussion.[45] The Court acknowledged the similarities shared between *Godinez* and *Edwards*, particularly that the mental competency of the defendants in both cases rested in a "gray area" somewhere between the *Dusky* standard to stand trial and a higher standard that measures the ability to understand and perform a more active legal role.[46] Despite these similarities, the Court differentiated the cases.[47] The Court argued that the *Godinez* petitioner sought a higher competency standard for a different purpose than to measure the defendant's ability to conduct trial proceedings—the very matter at issue presently before the Court.[48]

The Court proceeded by offering several considerations in support of its holding that a state does have the power under the Constitution to insist on the assistance of counsel for those defendants who lack the mental capacity to conduct a *pro se* defense.[49] First, the Court contended that precedent actually suggests a different, elevated competency standard is warranted

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[42] *Id.* at 2383. The Court explained that precedent could help frame, but could not directly answer, the issue before the Court. *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* at 2384.

[46] *Id.* at 2385.

[47] *Id.*

[48] *Id. See supra* note 39.

[49] *Edwards*, 128 S. Ct. at 2385-86.

where the defendant chooses to self-represent.[50] The Court next argued that the variable nature of mental illness should preclude measuring it with the single *Dusky* standard.[51] The Court further cautioned that granting self-representation to a defendant who "lacks the mental capacity to conduct his defense without the assistance of counsel" has an even likelihood of humiliating the defendant as ennobling him.[52]

In its conclusion, the opinion permitted judges to insist on legal representation for each defendant who the trial court determines does not possess the mental competency to conduct his own defense.[53] However, the Court limited its holding in two instances.[54] Specifically, the Court declined to supply a specific standard for those defendants the trial court estimated as potentially ineffective communicators during trial.[55] In addition, the Court expressly declined to overrule *Faretta*, noting that empirical data suggest that the case's holding has not produced unfair trials.[56]

B. Dissenting Opinion

In opposition to the majority view, the dissent averred that *Faretta* and *Godinez* are controlling precedent and, in turn, concluded that the Constitution forbids a state "to substitute its own perception of fairness for the defendant's right to make his own case before a jury."[57] The dissent began by emphasizing

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[50] *Id.* at 2386. The Court indicated that the foundational competency standard cases, *Dusky* and *Drope*, both apply the competency standard to situations with the assumption that the defendant will consult with counsel. *Id. See supra* notes 25-27 and accompanying text. In turn, the Court reasoned that since the present case involves a defendant who would elect to forego counsel, a different competency standard would be needed. *Edwards*, 128 S. Ct. at 2386.

[51] *Edwards*, 128 S. Ct. at 2386. The Court explained that mental illness can vary in degrees over an indefinite time and can affect an individual differently at different times and that the history of the instant case illustrated the disorder's complexity. *Id.*

[52] *Id.* at 2387. *See supra* note 36 and accompanying text.

[53] *Edwards*, 128 S. Ct. at 2387-88.

[54] *Id.* at 2388.

[55] *Id.*

[56] *Id.*

[57] *Id.* at 2389 (Scalia, J., dissenting).

those case facts that suggest Edwards was competent to conduct his own defense.[58] The dissent next argued that Edwards refused counsel both knowingly and voluntarily and thus had a constitutional right to present his case as he saw fit.[59] The dissenters then emphasized that *Godinez* correctly refused to create a higher competency standard for the right to waive counsel because the proper constitutional competency requirement for that right is the competence to waive the right, not to represent oneself.[60]

Having established that Edwards satisfied the requirements for constitutional protection of the right of self-representation under *Faretta* and *Godinez*, the dissent then turned to discuss possible limitations to that right.[61] To the dissenters, a state's apprehension over whether a trial is fair was not a legitimate ground for denying a defendant any of his constitutional rights.[62] While conceding that the rights of a deliberately unruly *pro se* defendant may be curtailed, the dissent stated that the Court has never constrained a defendant's ability to retain actual control over his presentation of a case to the jury.[63] According to the dissent, the Court deprived Edwards of this previously recognized right because the majority misinterpreted what "dignity" the right to self-representation was intended to protect.[64] The dissent asserted that the Court should rectify this misstep by honoring the choice to proceed *pro se* that Edwards had knowingly and voluntarily made.[65] In its final section, the dissent defended the

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[58] *Id.* The dissent provided that Edwards filed several intelligible pleadings, made coherent arguments in the courtroom, and correctly answered several questions on rules of law and procedure. *Id. See supra* notes 10, 12 and accompanying text.

[59] *Edwards*, 128 S. Ct. at 2391 (Scalia, J., dissenting).

[60] *Id. See supra* notes 39-40.

[61] *Id.* at 2391-92.

[62] *Id.*

[63] *Id.* at 2392.

[64] *Id.* at 2393. The dissent charged that, in the Court's pursuit to protect a defendant's individual dignity from the possible humiliation brought on by the presentation of an amateurish defense, the majority failed to see that the right is actually intended to prevent the state from depriving a defendant of the "dignity of being master of one's fate rather than the ward of the State." *Id.*

[65] *Id.*

constitutionality of self-representation by contending that a defendant's freedom to choose self-representation, even if such a choice is likely to be disadvantageous to his defense, is paramount to a state's interpretation of the Sixth Amendment's safeguards.[66] To conclude, the dissent branded the decision as "extraordinarily vague," pointing out that the nebulous range of mental illness the Court set as the standard to deny self-representation problematically necessitated future clarification and wrongfully encouraged trial courts to circumvent the headaches caused by self-representation by offering them more opportunity to assign unwanted counsel to defendants.[67]

IV. DISCUSSION

In the context of constitutional jurisprudence, the Supreme Court's holding in *Indiana v. Edwards* expanded protection from prosecution for a greater scope of mentally ill defendants in the name of fundamental fairness and due process.[68] This holding's impact on precedent has both narrow and broad significance. For the handful of defendants like Ahmad Edwards with a "gray area" of competency, this holding will supplant the significance of *Dusky* and *Godinez*.[69] In addition, the Court's refusal to overrule *Faretta* and not extend due process protection to those defendants who are not mentally incompetent but only poor communicators demarcated the boundaries of the decision's scope.[70] On a broader level, *Edwards* ventured to clarify the relation between mental competence and the demands the nation's adversary criminal justice system places on

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[66] *Id.* at 2393-94. The dissent indicated that when a lawyer for a defendant does not follow the wishes and directives of his client during trial, the defendant is denied the constitutional right to present his own defense. *Id.* The dissent continued by noting that Edwards' lawyer refused to implement the defense strategy of his client's choice during Edwards' trial. *Id.* at 2394. The dissent contended that this episode signified a misrepresentation of Edwards' personal defense, effectively "[imprisoning] a man in his privileges and [calling] it the Constitution." *Id.* (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942)).

[67] *Id.*

[68] *See supra* notes 20-21, 49, 53 and accompanying text.

[69] *See supra* notes 25-26, 38, 50 and accompanying text.

[70] *See supra* notes 54-56 and accompanying text.

defendants.[71]

The decision, however, does raise valid concerns regarding its applicability and effect on personal freedom of choice.[72] Because mental illness is so variable and difficult for both doctor and judge to diagnose and measure with precision, the decision's scope of future application could potentially vary to an unacceptable degree.[73] The Court's decision also lays the foundation for a serious erosion of free choice.[74] The protection the Court provided for the mentally ill defendants falling into the "gray area" comes at the cost of all mentally ill defendants who are competent to stand trial and voluntarily and intelligently elect to exercise their constitutional right to conduct their own defense but are tied to a lawyer for their own protection.[75]

V. CONCLUSION

In *Indiana v. Edwards*, the Supreme Court held that the states may insist that defendants be represented by counsel in instances when the defendant is mentally fit to stand trial but lacks the mental competency to conduct a *pro se* defense. Through its decision the Court attempted to extend the due process protection afforded by the resources of an assisting counsel to those defendants who were subjected to the rigors of a trial but had made the choice to endure these rigors alone. The scope of future applicability of this Court's efforts to extend fairness to a broader group of mentally ill defendants is difficult to assess due to the nature of mental illness. Yet, regarding the issue presented, the decision clearly sets a precedent that favors a state's sense of fairness over an individual's freedom to choose.

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[71] *See supra* notes 39-40, 46-48 and accompanying text.

[72] *See supra* notes 51, 62-63, 65, 67 and accompanying text.

[73] *See supra* notes 51, 67 and accompanying text.

[74] *See supra* notes 61, 62, 65-67 and accompanying text.

[75] *See supra* notes 29-31, 66-67 and accompanying text.

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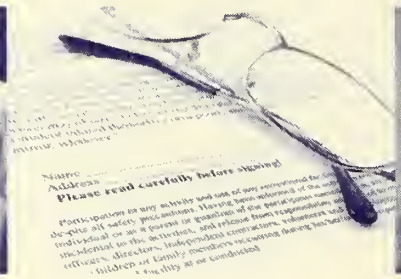

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